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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1980

FRANK E. MOSS,

Petitioner,

v.

G. ANDREW LAWRENCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Should the Court of Appeals for the Tenth Circuit be reversed for holding that:

A. A high-ranking, paid, professional political advisor and specialist to a candidate for the United States Senate was not a "public figure" for purposes of the First Amendment to the United States Constitution?

B. If not a "public figure" under the circumstances of A above, that a high-ranking, paid, professional political consultant who injected himself into a political campaign for the United States Senate to conduct polling, strategy formulation, voter targeting, volunteer organization, advertising, writing, fund raising and general campaign management was not a "public figure" for purposes of the First Amendment to the United States Constitution?

C. If not a "public figure" under the circumstances of A or B above, that a high-ranking, paid, professional campaign consultant and advisor who had extensively involved himself in a campaign for the United States Senate and who had previously held significant government and partisan political positions was not a "public figure" for purposes of the First Amendment to the United States Constitution?

D. If not a "public figure" under the circumstances of A, B, or C above, that a high rank-

ing, paid, professional political consultant and advisor was not a "public official" or "public figure" for the purposes of the First Amendment to the United States Constitution with regard to a comment made about said person during a campaign for the United States Senate in which he had voluntarily involved himself which comment reflected upon his previous significant government services?

II. Should the Court of Appeals for the Tenth Circuit be reversed for holding that a person's mere anonymity in one locale precludes that person from being a "public figure" there for purposes of the First Amendment to the United States Constitution despite his position as a paid, professional, high-level political consultant and advisor in that locale and his previous other significant and high-level governmental and political involvement elsewhere?

III. If the Court of Appeals for the Tenth Circuit properly found such a high ranking, paid, political consultant and advisor to be neither a "public official" nor a "public figure" should not this Court enunciate a new category including such persons in a status having identical significance to that of "public officials" and "public figures" for the purposes of the First Amendment to the United States Constitution?

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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1980

FRANK E. MOSS,

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v.

G. ANDREW LAWRENCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on January 13, 1981.

CITATIONS TO OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is not yet published but is printed in Appendix "A" hereto, infra, pp. A-1-11.

The unreported Memorandum Opinion of the United States District Court for the District of Utah, Central Division, is printed in Appendix "B" hereto,

infra, pp. B-1-24; (Civil No. 78-0195 (D. Utah July 23, 1979)). The Summary Judgment entered July 23, 1979, by the District Court is printed in Appendix "C" hereto, *infra*, p. C-1.

JURISDICTION

The Judgment of the United States Court of Appeals for the Tenth Circuit was entered January 13, 1981. The jurisdiction of the District Court was based upon 28 U.S.C. § 1332. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This is a diversity civil action for defamation brought by plaintiff-respondent, a resident of the State of Virginia, against defendant-petitioner, a resident of the State of Utah, in which respondent requests $1,000,000.00 in damages for lost earnings and $5,000,000.00 in general, special and punitive damages.

1. Statement of Facts

The facts presented here are uncontroverted. They are related in detail only to illustrate the nature of the legal principles involved.

Petitioner Frank E. Moss, hereinafter "Moss" was a United States Senator from the State of Utah for eighteen years until his defeat by Orrin G. Hatch, sometimes hereinafter "Hatch," in the 1976 general election.

In August of 1976, respondent G. Andrew Lawrence, hereinafter "Lawrence," an independent political campaign consultant, was retained by the National Conservative Political Action Committee and the Conservative Victory Fund. In September of 1976, Lawrence was sent to Utah as a paid, professional politician to aid the Senate campaign of Mr. Hatch. In Utah Lawrence engaged in political polling, strategy formulation, voter targeting, volunteer organization, advertising, writing, fund raising, and general campaign management on behalf of Mr. Hatch. Further, Lawrence's duties were to consult with and advise Hatch and his campaign staff on commercials, endorsement solicitation, direct mail, voter turn out, a get-out-the-vote program, statewide organizational structure, scheduling, and candidate appearances. In general, Lawrence consulted in the overall management of the campaign. For this work, Lawrence was paid by either the American Conservative Union or the Conservative Victory Fund with some partial payment from Hatch's campaign fund. Lawrence considered himself to be a valuable "profes-

sional" political advisor. In his opinion, the expertise he added to the Hatch campaign was superior to anything Hatch already had on his staff. He was no ordinary volunteer or campaign worker. He was sent to Utah as an experienced, highly trained professional by an outside group of political operatives. Lawrence even entertained thoughts of continuing with Hatch as a high-ranking advisor in Hatch's Senate staff should Hatch be elected.

One of the issues which arose in the campaign was whether or not candidate Hatch was receiving advice and services from non-Utahns. On October 26, 1976, Moss held a press conference attended by media representatives to discuss legislation affecting the elderly. In response to an unanticipated question from a media representative asking Moss about allegations that out-of-state extremists were running the Hatch campaign or donating money, Moss named Lawrence as one of those out-of-state extremists and further described Lawrence as a former employee of the re-election campaign committee for Richard M. Nixon and Spiro Agnew and as a "bagman for Spiro Agnew", for whom Lawrence had previously worked while in government employment. When asked what was meant by "bagman" Moss replied that it meant that Lawrence "would pick up the money Spiro would get".

Lawrence had been involved in concentrated political and governmental activity, shifting freely between "public official" and "public figure" status. Beginning in the late 1960's Lawrence acted as a White House

social aide for Presidents Lyndon B. Johnson and Richard M. Nixon. After more than two years at the White House, Lawrence became Staff Assistant to Vice President Spiro Agnew and in that public position was responsible for processing and reviewing all correspondence to and from the Vice President including political and governmental mail. Much of that mail was originated and reviewed personally by Lawrence. Additionally, Lawrence was responsible for reviewing major political decisions for their impact on the correspondence and organizational operations of Mr. Agnew's office.

After two and one-half years as an official on Vice President Agnew's staff, Lawrence joined the Committee for the Re-Election of the President which was the 1972 re-election campaign committee for President Richard M. Nixon and Vice President Spiro Agnew. While with the committee Lawrence was personally involved in administration, budgeting, fund raising, including direct mail fund raising, telephone campaign activities and national convention activities. Further, Lawrence oversaw the volunteer organization, personnel operation, office management, mail room, telephone, general public correspondence, national store front and directed all administrative support activities of the Republican National Convention headquarters in Miami for the 1972 Republican National Convention which nominated candidates for President and Vice President of the United States.

It was these associations with Vice President Spiro Agnew while employed directly by the United States

government or by Mr. Agnew's national campaign committee, being either a "public official" or "public figure", that gave rise to the characterization of Lawrence made by Moss.

After the election of President Richard M. Nixon and Vice President Spiro Agnew, Lawrence left the campaign organization in December, 1972, again becoming a "public official" by accepting an appointment as Special Assistant to the Assistant Administrator of the General Service Administration, an agency of the federal government. There Lawrence was assigned to handle Congressional and public affairs, briefings, and other management related activities of the General Services Administration. Lawrence resigned from the General Services Administration in January of 1974 after he was charged with civil service irregularities by the United States Civil Service Commission which recommended removal. The disciplinary proceedings instituted by the Civil Service Commission against Lawrence were terminated upon his resignation.

Six months later, Lawrence became Vice President for Administration and Director of Community Relations for the American Freedom Train Foundation, Inc., an organization established to function in the American Bicentennial celebration. Fourteen months later, Lawrence left the American Freedom Train Foundation and once again entered federal employment (April 1975) as an Administrative Assistant to the Administrator of the Social and Economic Statistics Administration of the United States Department of Com-

merce. Two weeks after joining the Social and Economic Statistics Administration (May 1975), Lawrence resigned after newspaper articles reported the earlier charges of illegal actions against him while at the General Services Administration.

Six months prior to the alleged defamatory statement, Lawrence graduated from the Republican National Committee's Campaign Management College after undergoing an intensive course in campaign management. Lawrence also completed the National Conservative Political Action Committee Campaign Management Seminar. In June, July and August, 1976, Lawrence was retained to raise funds for a statewide constitutional referendum in Oklahoma, to raise funds at the Republican National Convention at Kansas City for Senator Buckley of New York, and to solicit direct mail fund raising contacts from members of Congress. At the Republican National Convention in the Summer of 1976, Lawrence worked in Governor Ronald Reagan's campaign to obtain the Republican nomination for President of the United States. Fresh from these experiences (September 1976) Lawrence flew to Utah to aid candidate Orrin G. Hatch, to the extent noted earlier, in his contest with incumbent Senator Frank E. Moss, the petitioner herein.

2. Decisions Below

Based upon the foregoing uncontested facts, the District Court held upon a motion for summary judgment that Lawrence was a "public figure" as contemplated by the First Amendment to the United States

Constitution as interpreted by this Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and subsequent cases including *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Wolston v. Reader's Digest Assn. Inc.*, 443 U.S. 157 (1979); and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), for the purposes of Lawrence's defamation action for Moss' comments on Lawrence's association with Vice President Spiro Agnew. The District Court below wrote:

> In this case, we have a governmental and political operative who, between 1970 and 1976, swung back and forth across the line between high official government service and important partisan political activity. And whether in public service or whether involved in partisan political activity, he, by his own word, moved and turned at distances not too far removed from the hubs of great political and governmental power.
>
> When Plaintiff, in September 1976, left Washington, D.C. to go to Utah to "politic" for a candidate for the United States Senate in the capacity described by him, he could hardly leave within the District of Columbia his trappings, his indicia of a "public figure". And when he reached Utah he assumed and maintained at a significant level "an influential role in ordering society" and he was "intimately involved in the resolution of important public questions". *Butts, supra*, at 164 (Warren, C. J. concurring) [*Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967)]

See App. B-10-11.

The court determined that because of Lawrence's "public figure" status that in order to recover Lawrence

would have to prove that Moss had acted with actual malice, meaning knowing falsehood or reckless disregard for the truth.

The Court of Appeals for the Tenth Circuit reversed the determination of the District Court, declaring Lawrence to be a private individual upon the facts presented.

REASONS FOR GRANTING THE WRIT

POINT I

A FUNDAMENTAL FREEDOM IS AT ISSUE; FREEDOM OF SPEECH IN THE POLITICAL PROCESS NEEDS BREATHING SPACE.

The Freedom of Speech Clause of the First Amendment of the United States Constitution and the interpreting decisions thereon provide the broad scope of the freedom of speech we enjoy in our Constitutional form of government. *New York Times v. Sullivan*, 376 U.S. 254 (1964). Freedom of speech additionally implicitly countenances a freedom to hear thereby creating a free interchange of thought in the marketplace. At no other place is the need for the freedom to speak more necessary or more beneficial to the public than in the political arena. *First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *New York Times v. Sullivan, supra; Cantwell v. Connecticut*, 310 U.S. 296 (1940). In *Buckley v. Valeo, supra* at 14-15, this Court wrote:

> In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 28 L. Ed. 2d 35, 91 S. Ct. 621 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

The political contest, therefore, becomes the showcase for freedoms of speech.

In a political campaign the candidates are on the cutting edge of political philosophy and idealogy as concepts of government, society, and order are debated. Inevitably, this public debate tends to inform the electorate. In the competitive atmosphere of an election and the campaign preceding it, each candidate must speak to and address not only his own political philosophy but also that of his opponents, not solely in an effort to win the election and hold the office, but, more fundamentally, to enable the persons who must elect him to make an informed decision on their choice for a representative. The decision of this Court in *Buckley v. Valeo, supra* at 52-53, further reads:

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of a public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known

> so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country "public discussion is a political duty," *Whitney v. California*, 274 U.S. 357, 375, 71 L. Ed. 1095, 47 S. Ct. 641 (1927) (concurring opinion), applies with special force to candidates for public office.

The electorate's informed decision must, of necessity, also include the consideration of the integrity and personality of the candidate and the influences upon him. The identity and background of the persons who actively support the candidate at the inner circle of the campaign also become relevant to determine the influences under which the candidate operates. This becomes vital when dealing with paid political professionals who are sent to a local campaign by national groups, and especially so when the person has been in and out of "public official" and "public figure" status, the comment at issue concerns that status, and indeed seeks to return to a "public official" status on the staff of the very candidate he is being paid to help.

The integrity and benefits of the political process are, at least partially, dependent upon the breathing space afforded the political process. The freedom of political choice would have diminished significance without some protection being afforded when one speaks about a candidate's paid, high-level advisors. The protection granted one who discusses "public figures" is sufficient to grant the breathing space needed.

POINT II

THE DECISION BELOW IN THE COURT OF APPEALS FOR THE TENTH CIRCUIT CREATES A CONFLICT AMONGST THE CIRCUITS AND ERRS IN ITS DETERMINATION AS TO WHO IS A PUBLIC FIGURE.

The political campaigns for major national offices such as United States Senator and United States Congressman, although conducted within the states, undertake national significance. Campaigns in the various states and congressional districts around the country exert influence on national policy. For this reason external influence is often exerted in the individual states to affect the outcome of elections to national offices. Gone is the day where home-grown candidates could conduct totally home-grown campaigns. Candidates now seek out-of-state advisors, advertising agencies, campaign contributors, consultants, managers, specialists, and others whose contact with the state where "their" candidate is waging political war may only be tangential at best. Consequently, paid tactical squads of political experts, specialists, and strategists born, raised, educated and trained throughout the United States may be drawn together and injected into a forum far from their "home" in an effort to influence the outcome of a specific election and thus impact national policies. There they often seek key positions on the staff of the candidate they support.

Lawrence was one such out-of-state political expert who injected himself into the Utah Senatorial campaign after being politically active and involved in high government positions outside of Utah for years prior to that time. Lawrence's sole purpose for coming to Utah was to influence a Utah Senatorial campaign. Lawrence understood the purpose of his coming to Utah, hoping his candidate would emerge victorious and Lawrence would again become a high public official. This Court in *Associated Press v. Walker*, 388 U.S. 130 (1967), in establishing the "public figure" privilege wrote at 155 that one is a "public figure" by:

> . . . [p]urposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy. . . .

Lawrence had participated in the Hatch campaign in political polling, strategy formulation, voter targeting, volunteer organization, advertising, writing, fund raising and general campaign management, in addition to consulting with and advising the candidate as a paid "professional". The Court of Appeals concluded that Lawrence, nonetheless, was a behind-the-scenes administrator and unless he had voluntarily caused his name or identity to come to the forefront he was not a "public figure", even though he had been in and out of "public official" and "public figure" status over previous years outside of Utah.

The Court of Appeals neglected to consider that the high-level advisors and consultants to a candidate, whether behind-the-scenes or open to the public, may have a substantial impact upon the candidate's thinking

and philosophy and, consequently, the candidate's approach to public issues. On occasion, therefore, the candidate may merely act as a proxy or conduit for the philosophy of his advisors in the resolution of important public controversies. Even though the candidate's philosophy may be similar to that of his advisor, the candidate is influenced by the advisor's views on important public issues. This Court has said that those who meet the criteria to be defined as a "public figure" are those who merely thrust their personality into the "vortex" of important public controversies. *Associated Press v. Walker*, 388 U.S. 130, 155 (1967). The thrusting of one's personality into a vortex of a controversy does not require the surfacing to public view of the person's name or identity. Some may wish to exert influence upon the ordering of society and resolution of public debate anonymously yet their influence may be just as great or sometimes greater than the one whose name and identity become widely known. Hundreds of thousands of people join political forces every year to influence the election of a relative handful of candidates. These thousands of supporters, some of whom are paid for their expertise and specialty and travel throughout the country, undertake varying degrees of responsibility in resolving the important public issue of electing our representatives and governmental administrators. The Tenth Circuit, without distinguishing the highly trained, paid, professional campaign specialist from the volunteer precinct worker, excluded from free public scrutiny a whole class of highly influential men and women whose career goals are to influence public choices. Furthermore, the Tenth Circuit failed to take into account the past political and

governmental involvement of that high-ranking campaign aide in concluding that his mere anonymity in Utah notwithstanding his political and governmental history caused him to not reach the status of a "public figure", a conclusion we assert is erroneous.

The United States Court of Appeals for the Fifth Circuit has ruled in a situation substantially similar to the one now before this Court that those persons who become actively and substantially involved in the political campaign are public figures even though they are not the candidate and their names have not been intentionally brought to the forefront by the person so becoming involved. In *Time, Inc. v. McLaney*, 406 F.2d 565 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 (1969), the plaintiff contributed substantial material aid to a Bahama political campaign by providing transportation to specific candidates in the election. Under those circumstances, the Court of Appeals determined that the plaintiff was a "public figure" and was subject in his action to the limitations established by *New York Times v. Sullivan*, 376 U.S. 254 (1964). The Fifth Circuit Court specifically concluded at 573 that:

> . . . the constitutional privilege extends to discussions by specific individuals not associated with any government, if those individuals are involved in matters of important public concern. Such was the case of the plaintiff here. He had injected himself into an election campaign in a small foreign country in which the announced policy of the opposition to the present government was the elimination of racketeer gambling. He had supported the effort of this reform gov-

> ernment by contributing substantial material aid [transportation services], and thus lent a direct influence to the election of a national government for the country. Such activities as he engaged in and his conduct as such a participant, are the proper subject of inquiry and of public interest. It seems clear, that he, as much as General Walker in the *Walker* case [*Associated Press v. Walker*, 388 U.S. 130 (1967)], *supra*, acted in a manner that amounted to a "thrusting of his personality into the 'vortex' of an important public controversy". (Bracketed Matter Added.)

Therefore, a person found to be participating in the political campaign not as a candidate but merely in the behind-the-scenes effort of providing "substantial material aid" limited to transportation services was, in the opinion of that Court of Appeals, a "public figure".

The Court of Appeals for the District of Columbia also approached a similar matter to the one decided in the Tenth Circuit below and found the campaign aide to be a "public figure". In *Thompson v. Evening Star Newspaper Co.*, 394 F.2d 774 (D.C. Cir. 1968), *cert. denied* 393 U.S. 884 (1968), a public relations man in the District of Columbia took a prominent role in a group appealing for public support in the election of a specific slate to the local Democratic organization and was found to be a "public figure". The Court of Appeals reasoned at 776 that:

> [t]he public plainly has a vital interest not only in the calibre of candidates for political office, but in the nature of the groups or factions supporting the candidates, and the quality of candidates' spokesmen and backers are appropriate consider-

> ations to be taken into account. They "often play an influential role in ordering society".

The plaintiff in *Thompson* was an active political supporter and was, consequently, found to be a "public figure".

A District Court opinion in *Buchanan v. Associated Press*, 398 F. Supp. 1196 (D.D.C. 1975), further illustrates the conflict which the Court of Appeals' decision below creates. In *Buchanan* a former accountant to the campaign committee for the re-election of President Richard M. Nixon and Vice President Spiro Agnew brought a defamation action based on a publication related to the financial affairs of the committee. The plaintiff in that case was not the candidate nor even a close political advisor to the candidate nor was there any indication that he promoted his own name or identity. The District Court, nevertheless, found the plaintiff to have voluntarily injected himself into a matter of public controversy and was, consequently, a "public figure". The Court determined that the "complete and uninhibited reporting of all events relating to the American political process is very compelling" and, as such, those who voluntarily inject themselves into the political process become public figures at least so far as the political process is concerned. (*Id.* at 1202)

The decision of the Tenth Circuit Court of Appeals below is in direct conflict with the decision of the Fifth Circuit Court of Appeals and District Court decisions noted and in conflict in principle with the decision of the District of Columbia Circuit also noted above. Con-

sequently, the review of the presented issues by this Court would not only resolve the conflict amongst the circuits which have ruled on this issue, but would also further the beneficial effect of having some predictability on this subject which is so important to the exercise of fundamental rights and privileges.

Petitioner Moss firmly believes that the approach taken by the Fifth and District of Columbia Circuit Courts of Appeals noted above which are in conflict with the lower court herein is the approach that ought to be pursued in cases of this kind to avoid silencing vital issues by having candidates in constant legal jeopardy. The person who becomes actively involved at high levels of the political process, particularly as a paid "professional", voluntarily thrusts his personality into the vortex of important political decisions even if his name or identity fails to come into public view. Lawrence provided his political expertise to several candidates, including Mr. Hatch in his contest with Senator Moss. We are not here talking about those campaign volunteers, inherent and important to any campaign, who perform the numerous grass roots tasks of distributing flyers, block canvassing, envelope stuffing or other duties of that nature. The person who now asks for damages from Moss is one of the numerous paid, professional, high-level, but behind-the-scenes, political strategists who have graduated from those meaningful but less demanding tasks to the circle where his political advice and expertise are thrust forward and utilized. As such, they thereby achieve "public figure" status. If not a "public figure", we suggest that paid, high-ranking,

political advisors and consultants should further be classified into a new category which must prove actual malice in order to recover in a defamation action as do "public officials" and "public figures". *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

What the Court of Appeals for the Tenth Circuit has held would inhibit the discussion concerning a large class of high ranking advisors such as economic, foreign affairs, and domestic affairs advisors and consultants, even if paid professionals, who merely funnel their thoughts to their candidate for his or her later dissemination to the public. Freedom to discuss these advisors and their views is warranted, beneficial, and vital to our political process.

To our knowledge, this Court has never specifically addressed the status of non-candidate politicians such as Lawrence who do not seek the limelight but nonetheless exert influence on the resolution of important public issues. The unique combination of circumstances involving Lawrence provides the Court with a well defined opportunity to establish and settle the law in a most significant and fascinating area which sorely needs the artful guidance of the Supreme Court. Under these separate circumstances or a combination thereof this Court could determine whether the paid political advisor in various stages of involvement in the political process is a "public figure" or some other newly articulated category for the purposes of determining the applicable defamation standard.

CONCLUSION

Petitioner Frank E. Moss suggests that the Court of Appeals for the Tenth Circuit fundamentally erred in its determination as to who within the political process is a "public figure" or otherwise must show actual malice to recover in a defamation action thereby creating a conflict amongst the Circuit Courts of Appeals who have ruled otherwise and, we assert, correctly on the issues now before this Court. The Tenth Circuit's error rests not on a faulty determination of fact inasmuch as the facts are undisputed but rests upon a basic misunderstanding and misapplication of important constitutional principles in an area in which this Court has yet to rule. A rulng of this Court would establish the guidelines where none now exist whereby the important and fundamental freedoms afforded to speech are protected and fostered in the atmosphere of the political campaign where freedom of speech should have its "fullest and most urgent application", *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). Consequently, petitioner Frank E. Moss respectfully submits that a Writ of Certiorari should issue to the United States Court of Appeals for the Tenth Circuit to review the judgment rendered therein in this matter.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

G. ANDREW LAWRENCE,

Appellant,

v.

FRANK E. MOSS,

Appellee.

[January 13, 1981]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. C78-195)

Matthew A. Kane (Kane and Koons and Ronald C. Barker, with him on the briefs) for Appellant.

Donald B. Holbrook (D. Miles Holman and Jones, Waldo, Holbrook & McDonough, with him on the brief) for Appellee.

Before SETH, BREITENSTEIN and BARRETT, Circuit Judges.

BREITENSTEIN, Circuit Judge.

In this diversity action for defamation and slander, the district court sustained defendant's motion for summary judgment on the grounds that the plaintiff was a public figure, who could recover only on a showing of actual malice, and that the record did not present any question of fact on the existence of actual malice. We reverse and remand for trial.

The case was filed in the United States District Court for the District of Columbia and transferred to the District of Utah pursuant to 28 U.S.C. § 1406(a). A United States district judge from the District of New Mexico was designated to handle the case. The incidents giving rise to plaintiff's slander claim arose during the 1976 campaign for the election of a United States Senator from Utah.

The incumbent, defendant-appellee Frank E. Moss, was opposed by Orrin G. Hatch, the eventual winner. Plaintiff-appellant, W. [sic] Andrew Lawrence, assisted the Hatch campaign in various capacities during September and October, 1976. The slander is based on an October 26, 1976, interchange between defendant Moss and an unidentified reporter at a Utah press conference. The undisputed record shows the following:

> "*Question*: 'Mr. Richards said that you allege that Coors and other out-of-state extremists are running Hatch's campaign. Do you think they are running the campaign, or is it just that they have donated $5,000 bucks?'
>
> *Mr. Moss*: 'I think they have done both. They put in the money to begin with to get it started and they set the tone of what the campaign would be. There are a lot of advisers. Besides Mr. Coors, there's Ernest Wilkinson and Leon Skousen who are local people that are advising Mr. Hatch, but a young man named Andy Lawrence has been here. Mr. Hatch, in a joint appearance that we had, admitted that Andy Lawrence had been here as a consultant. Well, I know about Andy Lawrence. He was the bag man for Spiro Agnew. And he worked for

> CREEP. And he was sent out here by these right wing organizations to assist in this campaign. Now Mr. Hatch said Andy Lawrence is now gone. And I have to believe him. I haven't seen him. But he was here and he did work for a considerable period of time here.'
>
> *Question*: 'What do you mean when you say he was a "bag man" for Spiro Agnew?'
>
> *Mr. Moss*: '(He) picked up the money Spiro would get.'"

Plaintiff claims that the reference to "bag man for Spiro Agnew" is slanderous per se because it implies participation in bribery or receipt of illegal campaign contributions. A plaintiff who is a public figure must prove "actual malice" to recover for defamation. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, and its progeny discussed later. The first question is whether plaintiff is a public figure. The grant of summary judgment was based on the complaint, answers to interrogatories, responses to requests for admissions and for production of documents and depositions. The facts pertaining to the activities of the plaintiff are not contested.

In his early youth plaintiff was interested in politics. From January, 1970, through May, 1972, he served on the staff of Vice-President Agnew and participated in the "decision making process." In June, 1972, he joined the Committee for the Reelection of the President (CREEP) as the deputy director of administration with oversight of various political groups. In December, 1972, he was employed as "special assistant to the

Assistant Administrator of the General Services Administration" in Washington, D.C. Charges of improper conduct were brought against him and dropped after his January 25, 1974, resignation.

In April, 1975, plaintiff was employed by the United States Department of Commerce, and was terminated the next month after publication of an article in the *Washington Post* which called attention to his background, his connection with General Services, and his new employment. In May, 1976, plaintiff took courses in campaign management sponsored by the Republican National Committee and by the National Conservative Political Action Committee. After completion of the courses he raised funds in several states for various purposes. In August, 1976, he became an independent political campaign consultant and was retained by the National Conservative Political Action Committee, the Hatch for Senate Committee, and the Conservative Victory Fund.

Because the events pertinent to this lawsuit all occurred in Utah, plaintiff's status in Utah is of prime importance. Before the 1976 election campaign, plaintiff had no Utah connection. He came to Utah in September, 1976, and from then until his October departure he assisted the Hatch campaign as a private consultant in political polling, strategy, voter targeting, volunteer organization, advertising, writing, fund raising and general campaign management.

New York Times v. Sullivan, supra, protected the news reporting media against liability to public officials

in the absence of actual malice. Plaintiff here was not a public official. *New York Times* protection was extended to public figures by *Curtis Publishing Co. v. Butts*, 388 U.S. 130, decided together with *Associated Press v. Walker*. Butts, a well known and respected football coach, was subject to the usual publicity arising from the popular interest in the sport. Id. at 136. Walker had thrust himself into the limelight by organizing opposition to federal intervention in school integration and by statements on radio and television and in press conferences. *Id.* 140-141, 159. Both Butts and Walker were held to be public figures.

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, considered a suit by a distributor of nudist magazines against various news media. The eight judges participating in the decision expressed their views in five separate opinions, none of which commanded more than three votes. The plurality opinion of Justice Brennan concluded, *Id.* at 44, that "all discussion and communication involving matters of public or general concern" were protected by the *New York Times* rule.

In *Gertz v. Welch*, 418 U.S. 323, 351-352, the plaintiff was held not to be a public figure notwithstanding his authorship of legal books and articles, his activities in professional and civic organizations, and his role as plaintiff's attorney in a well publicized lawsuit against a police officer. The Court declined to follow the *Rosenbloom* extension of *New York Times* and said, *Id.* at 343, "the state interest in compensating injury to the reputation of private individuals requires that a

different rule should obtain with respect to them." The Court summarized its decision thus, *Id.* at 347:

> "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard for a publisher or broadcaster of defamatory falsehood injurious to a private individual."

Relying on *Gertz*, the Court in *Tme, Inc. v. Firestone*, 424 U.S. 448, 453-455, held that the plaintiff was not a public figure because she did not occupy a role of special prominence and had not thrust herself into the forefront of public controversy to influence the resolution of issues.

Hutchinson v. Proxmire, 443 U.S. 111, reversed a lower court decision that a scientist who had published extensively and received public grants for research projects was a public figure. The Court held that the essential ingredient of inviting public attention or comment was missing. The Court pointed out that the plaintiff had not thrust himself or his views into public controversy to influence others and had not assumed public prominence in the debate over the public funding of his projects.

Wolston v. Reader's Digest Ass'n., Inc., 443 U.S. 157, was a libel suit against the publisher of a book which identified the plaintiff as a Soviet agent. Relying on *Gertz*, the Court held that the plaintiff was not a public figure. *Id.* at 167. In so doing, the Court expressly rejected, *Id.*, the *Rosenbloom* doctrine "that the *New York Times* standard should extend to defam-

atory falsehoods relating to private persons if the statements involved matters of public or general concern."

In the case at bar several sources brought the attention of Moss to the Utah activities of the plaintiff. In response to a newsman's question, Hatch acknowledged participation of plaintiff in the campaign. The expense reports of Hatch showed payments to plaintiff. Russ Hemingway, a Director of the National Committee for an Effective Congress, informed Moss of plaintiff's involvement with GSA, Agnew, and CREEP. Moss had read the *Washington Star* article referring to plaintiff. Mary Jane Due, a Moss employee upon whom Moss relied for information and advice, inquired of Hal Wolfe, a Washington, D.C. representative of the National Committee for an Effective Congress and was told that plaintiff was an "Agnew bag man," and had been a consultant and fund raiser for right-wing committees. Ms. Due relayed the information to Moss.

Plaintiff's activities were in the background and concerned with administrative organization. He did not thrust himself into public prominence in Utah. So far as the record shows, he made no speeches and no radio or television appearances and did not write for public consumption. If he was a public figure, so are all those who participate inconspicuously in political action designed to influence an election.

Plaintiff is a private individual who claims that he was defamed by another private indivdual. The First Amendment rights of a private individual can rise no

higher than the rights of the news media considered in the *New York Times* line of cases. *Wolston* says, 443 U.S. at 167-168, that

> "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. * * * * A libel defendant must show more than mere news-worthiness to justify application of the demanding burden of *New York Times.*"

The participation of plaintiff in the Hatch campaign may have made him newsworthy but did not transform him into a public figure. The status of the individual claiming to be defamed is the controlling factor, not the nebulous interest of the public in a matter with which he is inconspicuously involved. See *Littlefield v. Fort Dodge Messenger*, 8 Cir., 614 F.2d 581, 583-584. On the record presented, plaintiff was not a public figure at the time of the alleged defamatory statement.

Gertz recognized the state interest in compensating injury to the reputation of a private individual. 418 U.S. 347-348. Following *Gertz*, we held in *Dixson v. Newsweek, Inc.*, 10 Cir., 562 F.2d 626, 629, that Colorado law controlled in a libel action brought by a private individual. Accordingly, Utah law controls in this case. The alleged defamation occurred in Utah and related to Utah events.

A pertinent Utah decision is *Ogden Bus Lines v. KSL, Inc.*, Utah, 551 P.2d 222, a libel and slander action by a private individual and private companies

against a broadcaster's statements relating to a matter of public interest. In denying recovery the court reviewed pertinent Utah decisions and quoted the following rule with approval. *Id.* at 224:

> "It is firmly established that matters of public interest and concern are legitimate subjects of fair comment and criticism, not only in newspapers, and in radio and television broadcasts, but by members of the public generally and such comments and criticisms are not actionable, however severe in their terms, unless they are made maliciously . . . ."

"Maliciously" was not used in the sense of *New York Times* because the court said that as no public official or candidate was involved "actual malice need not be shown" in a case relating to a matter of public concern. *Id.* at 225.

The court quoted with approval, *Id.* at 226, the statement in *Direct Import Buyers Association v. KSL, Inc.*, Utah, 538 P.2d 1040, 1042, that:

> "The malice which plaintiff must show in order to overcome a conditional privilege is simply an improper motive such as a desire to do harm or that the defendant did not honestly believe his statements to be true or that the publication was excessive."

Plaintiff argues that this Utah rule conflicts with the *Gertz* rejection of *Rosenbloom.* See *Gertz, supra,* 418 U.S. at 343, and *Wolston, supra,* 443 U.S. at 167. *Gertz* permits, 418 U.S. at 347, each state to fix its own standard of liability for defamation in a suit between

individuals so long as it does not impose liability without fault. Utah has abridged no right given by the federal Constitution but, in the area of defamation, has chosen to protect speech related to matters of general or public concern. The choice does not offend the federal Constitution.

In granting defendant's motion for a summary judgment, the trial court referred to "the absence of any evidence in this case which would create a genuine issue of material fact on the question of 'actual malice.'" The ruling is consistent with its decision that plaintiff was a public figure. Our rejection of that decision impels consideration of the propriety of a summary judgment.

In review of the grant of the defense motion for summary judgment, "we must construe the facts in a way most favorable to the nonmovant [the plaintiff]." *Buell Cabinet Company, Inc. v. Sudduth*, 10 Cir., 608 F.2d 431, 433. Intent is an intangible factor best left for determination of the fact-finder after a full trial. Id.

Moss said at the press conference that plaintiff was a "bag man for Spiro Agnew." The record contains no claim by the defense that the statement was true or a proper expression of opinion. The question then under the Utah decisions in *Import Buyers*, 538 P.2d at 1042, and *Ogden Bus Lines*, 551 P.2d at 224-226 is whether the statement was made with an improper intent to do harm, or with knowledge that the statement was false, or with reckless disregard for whether it was true or not. Resolution of these issues entails the drawing of factual inferences, a function of the fact finder.

The suggestion has been made that libel and slander cases are excepted from the general rule that summary judgment is improper when intent is an issue. The reason given is that such cases threaten the free exercise of the rights of speech and press. See Wright and Miller, *Federal Practice and Procedure: Civil*, § 2730, pp. 590-592.

Hutchinson, supra, 433 U.S. at 120, n. 9, recognized that malice calls in question a defendant's state of mind and does not lend itself readily to summary judgment. The propriety of summary judgment was not before the Court in that case. It may be that in some cases brought against a member of the news media summary judgment is proper as a screening device to prevent unnecessary harassment. The instant case is not of that nature.

In *Ogden Bus Lines, supra,* the Utah court upheld a summary judgment in a news media suit when the record showed the truth of one statement and the court held that the other challenged statement was legitimate editorial comment. Such is not the case here. On the record presented the grant of summary judgment was improper.

Reversed and remanded for trial on the merits.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

Civil No. C 78-195

G. ANDREW LAWRENCE,

Plaintiff,

v.

FRANK E. MOSS,

Defendant.

[July 23, 1979]

MEMORANDUM DECISION

The Motion for Summary Judgment filed by Defendant on November 13, 1978, will be granted.

I have decided to rule as a matter of law that:

1. The Plaintiff is a "public figure" as this conceptualization was conceived, has developed and has been refined in the following United States Supreme Court cases:

a) *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967);

b) *Associated Press v. Walker,* 388 U.S. 130 (1967);

c) *St. Amant v. Thompson,* 390 U.S. 727 (1968);

d) *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971);

e) *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974);

f) *Hutchinson v. Proxmire*, No. 78-680, decided June 26, 1979;

g) *Wolston v. Reader's Digest Association, Inc.*, No. 78-5414, decided June 26, 1979.

Therefore, before Plaintiff could recover in this case, it would be his burden to show that Defendant made the remark complained of with "actual malice", i.e.:

a) that the Defendant knew the statement he made was false, or

b) that Defendant made the statement with reckless disregard as to whether it was true or false.

2. The statement of which Plaintiff complains related to a matter of "public or general concern" under the law of defamation in the State of Utah. Therefore, before Plaintiff could recover in this case, it would be his burden to show that Defendant made the remark complained of with "actual malice", i.e.:

a) that the Defendant knew the statement he made was false, or

b) that Defendant made the statement with reckless disregard as to whether it was true or false.

3. In this case, there does not exist evidence from

which a jury could determine that Defendant made the statement of which Plaintiff complains with "actual malice", i.e.:

a) that the Defendant knew the statement he made was false, or

b) that Defendant made the statement with reckless disregard as to whether it was true or false.

Therefore, recovery to Plaintiff in this case is barred by the First Amendment to the United States Constitution *and* the law of the State of Utah.

New York Times v. Sullivan, 376 U.S. 254 (1964) established that:

> ". . . the constitutional guarantees (of freedom of speech and press) require . . . a federal rule that prohibits a *public official* from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — *that is, with knowledge that it was false or with reckless disregard of whether* it was true or not." (Parenthesis and emphasis mine.)

Butts, supra, and *Walker, supra*, extended *New York Times, supra, to "public figures"*. Mr. Justice Warren, announcing in his concurring opinion the reasoning accepted by a majority of the Court, observed:

> "In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, com-

> mittees, commissions, corporations and associations, some only loosely connected with the government. *This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office are nevertheless intimately involved in the resolution of important public questions* or, by reason of their fame, shape events in areas of concern to society at large." (emphasis mine)

Gertz, supra, rested the proposition that the First Amendment constitutional protection requiring a showing of "actual malice" extends only to situations where the defamatory falsehood is made in relation to "public officials" or "public figures". Before *Gertz*, a plurality of the United States Supreme Court, in *Rosenbloom, supra,* had concluded that the constitutional protection should extend to defamatory comment relating to private persons if the comment related to "matters of genral or public interest."

However, while the First Amendment protection requiring a showing of "actual malice" extends only to cases involving "public officials" and "public figures", the "actual malice" standard is, in my opinion, applicable in the State of Utah where the defamatory falsehood relates to a private person but the statement relates to a matter which "is of public or general concern."

Gertz, in 1974, specifically held that so long as liability without fault was not imposed, the individual states could adopt standards of liability for publication of defamatory falsehood. The Supreme Court, on this line, recognized that the First Amendment did not pro-

hibit the states from permitting those defamed recovery in instances where they were not "public officials" or "public figures" and in certain proscribed circumstances. However, in 1976, the Supreme Court of Utah marched back to *Rosenbloom* and not on the trail cleared in *Gertz.*

In *Ogden Bus Lines v. KSL, Inc.*, 551 P.2d 222, the Supreme Court of Utah in *dicta* indicated its approval of the "actual malice" standard where matters of "public or general concern" were involved although the defamatory statement related to a person who was not a "public official" or a "public figure". The Supreme Court of Utah quoted with approval the following from *Walker v. Colorado Springs Sun, Inc.*, 538 P.2d 540 (Colo. 1975):

> "We hold that, when a defamatory statement has been published concerning one who is not a public official or a public figure, *but the matter involved is of public or general concern, the publisher of the statement will be liable to the person defamed if, and only if, he knew the statement to be false or made the statement with reckless disregard for whether it was true or not.*" (Emphasis mine)

Ogden Bus Lines, supra, was decided by the Supreme Court of Utah two years after the United States Supreme Court decided *Gertz.* This is persuasive that the Supreme Court of Utah chose the *Rosenbloom* approach rather than that embraced in *Gertz.*

Therefore, in this case, "actual malice" on the part of Defendant must be shown by Plaintiff because:

a) Plaintiff is a "public figure", and

b) the comment by Defendant related to a matter of "public or general concern".

THE PLAINTIFF AS A "PUBLIC FIGURE"

Some of the most eloquent testimony attesting the "public figure" status of Plaintiff comes from Plaintiff himself.

Plaintiff's experience and background as a political operative and his exposure to public political activity from the time he was eleven (11) years old to the time he became "an independent political campaign consultant" in August 1976 as best evidenced by his answers to Interrogatories 2 and 3, which answers were filed in this case on September 29, 1978. A copy of these answers is attached to this Memorandum Decision. I have underlined and double-underlined statements of the Plaintiff which I believe establish him as a "public figure".

The Vice President whom Plaintiff served from January 1970 through May 1972 was Mr. Spiro Agnew. It was Mr. Agnew's "political and governmental mail" which was frequently "originated" by Plaintiff. "Major political decisions" of his employer were reviewed by Plaintiff for "impact" and Plaintiff was "often a part" of the "decision-making process" in Mr. Agnew's office.

In June 1972, Plaintiff joined the Committee for the Re-Election of the President (CREEP) as Deputy Director of Administration. In his position, Plaintiff had

"oversight" responsibility over "the volunteer organization, personnel operation, office management, mail-room, telephone, general public correspondence, national store front" together with "all administrative support activities of the National Convention Headquarters Hotel in Miami". The national convention referred to was the one which nominated Mr. Richard Nixon as a candidate for the presidency of the United States in the election of 1972.

On termination from CREEP in December 1972, he became employed as a "special assistant to the Assistant Administrator of the General Services Administration" in Washington, D.C. His responsibilities included "assignments in Congressional and public affairs, briefings, and other management-related activities".

Termination from GSA in January 1974 resulted after the following: On January 7, 1974, Plaintiff was informed by letter from Mr. Bernard Rosen, Executive Director, United States Civil Service Commission, that he, Rosen, proposed recommending to the Civil Service Commission that Plaintiff be removed from federal employment for the reason that:

> "During the period from March 1973 to July 1973, while serving as special assistant to the assistant administrator, GSA, you conducted yourself in such a manner as to cause GSA personnel officials unlawfully to obtain employment with GSA for specially referred candidates. Specifically: (and here follow recitation of 6 cases where plaintiff allegedly acted improperly).

Rosen charged Plaintiff with being:

> ". . . closely involved in the day-to-day operation of a special referral system that operated outside regular personnel channels in GSA."
>
> (above two quotations from letter, January 7, 1974, Bernard Rosen to Plaintiff. This letter is admitted in Answer to Interrogatory 54, which answers were filed January 8, 1979. Copy of letter is found in Exhibit "B" to Defendant's Second Set of Requests to Admit filed November 27, 1978.)

On February 11, 1974, Mr. Rosen advised Mr. Arthur F. Sampson, Administrator, General Services Administration, Washington, D.C., that Plaintiff had resigned as of January 25, 1974, and, therefore, disciplinary proceedings initiated by January 7, 1974, letter were terminated.

In April 1975, Plaintiff became employed by the United States Department of Commerce at Suitland, Maryland. (Answer to Interrogatory No. 3 filed September 27, 1978.)

In connection with this employment, the *Washington Star*, under a headline reading:

AIDE UNDER FIRE SLIPPED UNNOTICED INTO ANOTHER KEY POST

related the prior background and employment and termination of Plaintiff with GSA as well as his new employment. The first paragraph of that article reads:

> "A former Nixon re-election committee staff member, who resigned from one federal agency

> after being charged with violating Civil Service Laws, was given a sensitive job at another agency last month without the knowldge of the U. S. Civil Service Commission."

(Exhibit "A", attached to Affidavit of Frank Moss, filed November 13, 1978.)

Plaintiff's employment with the United States Department of Commerce was terminated in May 1975. (Plaintiff's Answer to Interrogatory No. 3.)

In May of 1976 Plaintiff completed a course in campaign management sponsored by the Republican National Committee at its "Campaign Management College". Also, in the same month, he completed a course sponsored by the National Conservative Political Action Committee. In the months of June, July and August 1976, he raised funds for a constitutional referendum in Oklahoma. He also raised funds at the Republican National Convention at Kansas City for Senator Jim Buckley of New York and also worked for Governor Ronald Reagan's campaign at the same National Convention.

In August of 1976 the Plaintiff became an independent political campaign consultant. He was retained by the National Conservative Political Action Committee, the Hatch for Senate Committee and the Conservative Victory Fund. (Plaintiff's Answer to Interrogatory No. 3.)

The above was the experience, the background, the reputation in political and governmental affairs which

Plaintiff brought to Utah in September 1976. This was the baggage which accompanied Plaintiff to Utah when he came to assist and consult in the political campaign of Orrin Hatch. And he came to Utah to engage in "political polling, strategy, voter targeting, volunteer organization, advertising, writing, fund raising and general campaign management." (Plaintiff's Answer to Interrogatory No. 3.)

In his very words his expertise in the campaign of Orrin Hatch was "far and away superior to anything they already had". He considered himself a valuable "professional" political advisor. (Plaintiff's deposition, p. 56)

Gertz teaches that it is not absolutely necessary to purposefully seek or suffer great renown or great notoriety in order to occupy "public figure" status in the law of defamation. This station, this distinction or, depending on perspective, this predicament can be gained although one would consciously wish that the cup might quietly pass to others.

In this case, we have a governmental and political operative who, between 1970 and 1976, swung back and forth across the line between high official government service and important partisan political activity. And whether in public service or whether involved in partisan political activity, he, by his own word, moved and turned at distances not too far removed from the hubs of great political and governmental power.

When Plaintiff, in September 1976, left Washington, D.C. to go to Utah to "politic" for a candidate for the United States Senate in the capacity described by him, he could hardly leave within the District of Columbia his trappings, his indicia of a "public figure". And when he reached Utah he assumed and maintained at a significant level "an influential role in ordering society" and he was "intimately involved in the resolution of important public questions". *Butts, supra,* at 164 (Warren, C. J. concurring). In September and October 1976, one of the steaming controversies in Utah was the senatorial race in which Orrin Hatch was challenging then Senator Frank Moss, the Defendant in this case. Plaintiff worked at the "forefront of (this particular controversy) in order to influence the resolution of the issues involved." *Gertz, supra,* at 345 (Powell, J.)

THE PLAINTIFF IN RELATION TO A MATTER OF "PUBLIC OR GENERAL CONCERN"

As pointed out earlier, it is my opinion that in the State of Utah, unless "actual malice" is shown, a person claiming to have been defamed cannot recover because of a defamatory statement which is related to a matter of "public or general concern" even if claimant is a private person as distinguished from a "public person" or "public official".

In Defendant Frank Moss' campaign for re-election to the United States Senate in November 1976, one of the campaign issues was whether his opponent,

Orrin Hatch, was receiving advice and services from non-residents of the State of Utah. Defendant had learned from a statement made by Orrin Hatch on public television that Plaintiff had been helping in Hatch's election campaign and that Plaintiff was formerly on Spiro Agnew's staff. Defendant had previously seen other evidence that, indeed, Plaintiff had been working in the Hatch Campaign in Utah. (Affidavit of Frank Moss filed November 13, 1978)

In this context, the Plaintiff himself was an issue in the campaign. He was, indeed, the subject or matter of "public or general concern". Thus, when, on October 26, 1976, the Defendant was asked by a newspaper reporter about "out-of-state extremists" running Hatch's campaign, the remark he made about Plaintiff was one relating to the subject about which there was "public or general concern".

AS TO WHETHER A GENUINE ISSUE OF MATERIAL FACT EXISTS ON "ACTUAL MALICE"

I accept counsel for Defendant's position and authorities under Point IV, Sub-Point 3, page 16, of his Statement of Points and Authorities in Support of Defendant's Motion for Summary Judgment as a fully adequate statement as to the absence of any evidence in this case which would create a genuine issue of material fact on the question of "actual malice".

Santiago E. Campos
United States District Judge

[ATTACHMENT TO MEMORANDUM DECISION OF DISTRICT COURT]
(Underscoring and Emphasis Supplied by District Court)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. C-78-195

G. ANDREW LAWRENCE
Plaintiff,

v.

FRANK E. MOSS
Defendant.

ANSWERS OF PLAINTIFF TO DEFENDANT'S INTERROGATORIES

Interrogatory No. 1.

Question: Identify the plaintiff.

Answer: Gayle Andrew Lawrence; home address, 6334 Olde Towne Court, Alexandria, Virginia 22307; business address, 2030 North 16th Street, Arlington, Virginia 22201; presently employed by Thomson McKinnon Securities, Inc., as a stockbroker selling securities.

Interrogatory No. 2.

Question: State the factual basis of plaintiff's claim in Paragraph 2 of plaintiff's Amended Complaint that plaintiff is qualified by training and experience

(a) "to manage political campaigns;"

(b) "assist and advise candidates for, and encumbents of political offices;" and,

(c) "raise funds on behalf of political candidates."

Answer: Since 1957, while a resident of New Orleans, Louisiana, plaintiff has been active in partisan and non-partisan political activities. At age 11, plaintiff was active in literature distribution for a city council candidate of the Democratic party in New Orleans, Louisiana; in 1958 plaintiff worked for Democratic Ross Barnett v. J. P. Coleman in the Mississippi Governor's campaign as a "poster hanger" covering most of the Gulf Coast of Mississippi. A year later, plaintiff was active for a former mayor of New Orleans in his efforts to become Governor of Louisiana; plaintiff distributed campaign literature door-to-door. [All underscoring herein, including double underscoring, supplied by District Court.]

During high school and college plaintiff was active in Key Club high school yearbook and other campus organizations and activities to raise monies in support of organizational programs. The activities ranged from car washes and picnics to various types of contests (ice cream eating) and direct appeals for funds.

While serving both President Johnson and President Nixon, plaintiff was a White House social aide and served as group secretary for over one year. One of the responsibilities was an annual fund raising outing

to secure monies for group programs and activities. Two highly successful poolside barbeques raised substantial dollars.

From January, 1970 through May, 1972, plaintiff was employed by the Office of the Vice President of the United States, the second highest political office in this country. As Staff Assistant to the Vice President responsible for correspondence, all mail, incoming and outgoing, was processed and reviewed within plaintiff's staff responsibility. Frequently, political and governmental mail was originated and reviewed personally by plaintiff. Major political decisions were reviewed for their impact on the correspondence and organizational operations. Plaintiff had personal knowledge of the decision-making process and was often a part of that process.

During the 1972 Presidential campaign, plaintiff was Deputy Director of Administration for the Committee for the Re-election of the President. From this position, plaintiff had extensive exposure to the political process and the vital elements of a political campaign. Plaintiff was personally involved in administration, budget, fund-raising (working directly with the people doing the direct mail fund-raising), telephone campaign activities and National Convention activities.

In 1974 and 1975 plaintiff was employed as Vice

President for Administration and Director of Community Relations for the American Freedom Train Foundation, Inc., Baileys' Crossroads, Virginia, doing planning, managerial and promotional work for a traveling Bicentennial exhibit.

Plaintiff was graduated from the Republican National Committee's "Campaign Management College" on May 28, 1976 (Plaintiff was a campaign staff director for a five-man team directing a hypothetical Congressional campaign). This was a six day, round-the-clock live-in intensive course in campaign management. Also in May, 1976, plaintiff completed the NCPAC Campaign Management Seminar, a three-day course given by the National Conservative Political Action Committee, Mr. John T. Dolan, director, 1500 Wilson Boulevard, Arlington, Virginia. During June, July and August, 1976, plaintiff was retained by Civic Development Group, headed by Brad O'Leary, to raise funds for a statewide constitutional referendum in Oklahoma, to raise funds at the Republican National Convention in Kansas City for Senator Jim Buckley of New York, and to solicit other direct mail fund-raising contracts from members of Congress. Also in August, plaintiff worked for Governor Reagan's campaign during the National Convention in Kansas City.

All of the above preceded plaintiff's involvement in the 1976 Utah Senatorial campaign.

Interrogatory No. 3.

Question: Identify each and every employer of plaintiff since January 1, 1965, and with regard to each such employment identify the work done or services performed.

Answer: January 1, 1965, plaintiff was a management student, University of Southwestern Louisiana, Lafayette, Louisiana. Was graduated in June, 1966. July, 1966, plaintiff was employed by the New Orleans Recreation Department, City Hall, New Orleans, Louisiana, as a summer day camp director for school children ages 6-12. Directed the daily activities of over 200 children. Completed in August, 1966.

September, 1966, plaintiff was employed by the Orleans Parish Public Schools, New Orleans, Louisiana, as a long-term substitute school teach. Taught 7th and 9th boys physical education. Completed in December, 1966. January, 1967, plaintiff entered the U.S. Army as a second lieutenant, being promoted to the rank of captain during his three year tour. After nine weeks of basic officer training at Fort Sam Houston, San Antonio, Texas, plaintiff was assigned to Ft. Meade, Maryland for one month, then was assigned to the U.S. Army, Office Surgeon General, Field Activities Unit, Washington, D.C. Primary duties included data processing — computer management responsibilities. Additional duty as a White House military social aide, working for two Presidents, to ensure well organized, successful gatherings in the White House and other locations. Completed in January, 1970.

In January, 1970, plaintiff joined the Office of the Vice President, the White House, Washington, D.C. as the staff assistant for correspondence. Plaintiff reported to the Assistant Chief of Staff for Administration and was responsible for a staff of sixteen professionals processing all correspondence addressed to the Vice President and the members of his staff. Completed in June, 1972.

June, 1972, plaintiff joined the staff of the Committee for the Re-election of the President (now defunct) in Washington, D.C. as the Deputy Director of Administration. Duties included oversight of the volunteer organization, personnel operation, office management, mail-room, telephone, general public correspondence, national store front and all administrative support activities of the National Convention headquarters hotel in Miami. Also had supervisory and operational responsibility for seven telephone banks in Los Angeles, California. Completed in December, 1972. In January, 1973, plaintiff became a special assistant to the Assistant Administrator of the General Services Administration in Washington, D.C. Duties included assignments in Congressional and public affairs, briefings, and other management related activities of the office. Completed in January, 1974.

July, 1974, plaintiff was employed by the American Freedom Train Foundation, Inc. of Baileys' Crossroads, Virginia (now defunct). This organization was an educational foundation organized to operate during the

U.S. Bicentennial. Plaintiff served the dual role as Vice President for Administration and Director of Community Relations. Responsibilities covered all office management functions and organizational contact with over eighty display cities across America. Completed March, 1975.

April, 1975, plaintiff was employed as Administrative Assistant to the Administrator of the Social and Economics Statistics Administration, U.S. Department of Commerce, Suitland, Maryland. Duties included administrative responsibilities of all kinds. Completed in May, 1975.

February, 1976, plaintiff was employed by Eugene Simpson & Brothers, Inc., 300 North Lee Street, Alexandria. Duties covered a wide range of construction details. Completed in May, 1976.

June, 1976, plaintiff was employed by Civil Development Group, Inc. of Nashville, Tennessee, as Vice President of Regional Marketing, (now defunct). Duties included political fund-raising for a constitutional referendum in Oklahoma; fund raising for Jim Buckley of New York. Direct mail and personal solicitation techniques were developed and implemented. Was responsible for marketing the corporate services in Washington, D.C. Completed in August, 1976.

August, 1976, plaintiff became an independent political campaign consultant and was retained by the National Conservative Political Action Committee, the

Hatch for Senate Committee and the Conservative Victory Fund. Plaintiff's services covered political polling, strategy, voter targeting, volunteer organization, advertising, writing, fund raising and general campaign management. Activities were completed in November, 1976.

January, 1977, plaintiff became associated with Thomson McKinnon Securities, Inc., member firm of the New York and other Stock Exchanges. Duties have included the sale of a full range of marketable investment opportunities.

[EXCERPT FROM STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT INCORPORATED INTO THE MEMORANDUM DECISION OF THE DISTRICT COURT AT B-12.]

A showing of "actual malice" must be made as an element, among others, of plaintiff's case in order to fix liability for defamation. "Actual malice" exceeds simple negligence. As such, defendant cannot be found liable to plaintiff on negligence or any mere failure to act as a reasonable man under the circumstances. The United States Supreme Court has written regarding the reckless disregard for the truth portion of the "actual malice" standard:

> . . . reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

In *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), the Supreme Court further said that:

> . . . only those false statements made with a high degree of awareness of their probable falsity . . . may be the subject of either civil or criminal sanctions.

No public figure plaintiff or plaintiff who is involved in matters of public or general concern can recover in a

defamation action without at least meeting that high standard.

Defendant, as did others, understood the term "bagman" to mean a person authorized to receive contributions for a person running for office. This use of the term was common in political circumstances by those involved in the political process. With that as a background, defendant had learned various items about plaintiff from newspaper articles, campaign reports, a director of the Committee for an Effective Congress, and campaign aides. All that source material caused defendant to understand prior to the making of the statements of which plaintiff complains: that plaintiff had been employed as a staffman for Spiro Agnew and the Committee to Re-elect the President; that plaintiff had been a fund raiser and paid political operative for right-wing committees; that plaintiff had been employed in the Hatch for Senate campaign; and that plaintiff had received some adverse publicity regarding plaintiff's former employment with the General Services Administration and the Social and Economic Statistics Administration. And most importantly, one of defendant's close aides upon whom defendant relied for information and advice inquired of the Washington, D.C., director of the Committee for an Effective Congress, a reputable political action group, regarding plaintiff and was told by that director that plaintiff was an "Agnew bagman" in those very words. Defendant's aide relayed that information, using the words "Agnew bagman", to defendant prior to October 26, 1976, the date upon

which the statements concerning plaintiff were made by defendant.

Defendant's statements were made during a busy campaign at a press conference at the questioning of a pressman just moments earlier. The pressman presumably wanted his answer then, not later. Defendant had heard that plaintiff was an "Agnew bagman" from a trusted aide, and, along with the other findings defendant had accrued, had merely relayed that information to the press without further inquiry. Defendant need not have investigated further to verify his facts. The United States Supreme Court has concisely pointed out in *St. Amant v. Thompson, supra,* that failure to investigate does not show "actual malice". In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974), the United States Supreme Court wrote at 332:

> . . . that mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. Rather the publisher must act with a "'high degree of awareness of . . . probable falsity.'"

Without more, any claim that plaintiff may have that defendant failed to adequately investigate is insufficient evidence that defendant acted with "actual malice".

Senators and other candidates for office must rely on aides and assistants for the gathering of information. The burden of being a representative would be too great to bear and his tenure ineffective if he had to conduct all his own investigations and fact finding efforts. Defendant merely relied on one upon whom he had come

to rely in the past. As such, defendant heard the phrase "Agnew bagman" as describing plaintiff prior to October 26, 1976, from a person to whom defendant looked for information and advice. Surely, relying upon a trusted aide does not demonstrate a high degree of awareness of the probable falsity of the statement as required by the "actual malice" standards. Defendant's statements were not fabricated by him but were a result of previous conversations and consultations with his aides. From what defendant had presented to him by his aides his statements were totally and completely reasonable.

The finding of "actual malice" must be made with "clear and convincing" proof. *New York Times v. Sullivan, supra,* at 285-286; *Gertz v. Robert Welch, Inc., supra* at 342. Plaintiff has failed as a matter of law to demonstrate any facts upon which a clear and convincing finding of "actual malice" can be predicated. Without such a finding plaintiff has no claim for damages and his action should be dismissed.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

Civil No. C 78-195

G. ANDREW LAWRENCE,

Plaintiff,

v.

FRANK E. MOSS,

Defendant.

[July 23, 1979]

SUMMARY JUDGMENT

The Motion for Summary Judgment filed by Defendant on November 13, 1978, having been heard and considered by the Court, and the Court having determined that there are no genuine issues of material fact in this case and having concluded, as a matter of law, that summary judgment should be entered for Defendant,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant have judgment herein and that Plaintiff's Complaint should be, and hereby is, dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant shall have his costs.

Santiago E. Campos
United States District Judge

No. 80-1669

MAY 5 1981
ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

FRANK E. MOSS,

Petitioner

v.

G. ANDREW LAWRENCE,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the protections accorded to media defendants in libel and slander actions by the First Amendment to the Constitution of the United States extend also to a non-media defendant who is a candidate for public office and who utters a slanderous statement regarding one of the supporters of his political opponent?

2. Whether a professional political consultant who is paid by or on behalf of a candidate for public office to advise the candidate regarding political polling, strategy, voter targeting, volunteer organization, advertising, writing, fund raising and general campaign management, but who did not himself seek or attain public prominence as a result of these activities, is a "public figure" whose defamation is constitutionally protected absent "actual malice"?

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IN THE

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OCTOBER TERM, 1980

No. 80-1669

FRANK E. MOSS,

Petitioner

v.

G. ANDREW LAWRENCE,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondent, G. Andrew Lawrence, opposes the Petition of Frank E. Moss for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review the judgment of that Court entered in the above entitled case on January 13 1981.

CITATIONS TO OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is published at 639 F2d 634.

The Memorandum Opinion of the United States District Court for the District of Utah has not yet been published,

but is printed as Appendix B to the Petition for Writ of Certiorari.

JURISDICTION

The Judgment of the United States Court of Appeals for the Tenth Circuit was entered January 13, 1981. The Petition for Writ of Certiorari was docketed in this Court on April 6, 1981. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Mr. Lawrence had been interested in politics all his life. Even as a school-boy he helped pass out campaign literature. He was active in campus politics, and upon graduation from college he was commissioned in the Army and assigned as a social aide at the White House. After completing his Army duty, he was employed on the staff of then-Vice-President Spiro Agnew, as Staff Assistant responsible for correspondence. In 1972 he joined the Committee for the Reelection of the President as Deputy Director of Administration, and was involved in administration, budget, fund raising, telephone and direct mail solicitation, and National Convention activities. Following the election, he was appointed a special assistant to the Assistant Administrator of the General Services Administration in Washington, D.C. Later that year (1973) allegations were made by the Civil Service Commission that Mr. Lawrence and other political appointees had violated federal regulations in attempting to place job applicants referred to them by senators and congressmen. After an administrative law judge threw out the charges against a fellow employee, the Civil Service Commission withdrew all charges against Mr. Lawrence. Meanwhile, however, Mr. Lawrence had resigned from government service and taken a position as Vice President for Ad-

ministration and Director of Community Relations of the American Freedom Train Foundation, Inc. (Answers to Interrogatories, R 22).

In April, 1975, Mr. Lawrence again entered government service as Administrative Assistant to the Administrator of the Social and Economics Statistics Administration, United States Department of Commerce. While his prior employment history was known to the official who appointed him, higher-ups in the Department forced him to resign shortly thereafter because of the CSC's allegations against him at GSA. This resignation was reported by the Washington Star newspaper on May 12, 1975 under the headline "Aide Under Fire Slipped Unnoticed into Another Key Post" (Exhibit A to Affidavit of Moss, R 96). The only references to Mr. Lawrence's relationships with Mr. Agnew and CREEP in the article were factual statements that Mr. Lawrence was

> "A 30-year-old former member of the Nixon campaign and a one-time member of the staff of former Vice President Spiro T. Agnew . . . Lawrence worked for Agnew from 1970-72. He worked for the Nixon campaign in 1972 and joined GSA in early 1973."

This article was a reprint of an article which had appeared in the St. Louis Post-Dispatch three days earlier, written by Robert Adams (Exhibit 4 to Adams' deposition).

In the campaign year of 1976 Mr. Lawrence attended two courses on campaign management and was employed to raise funds and work for conservative candidates and causes in Oklahoma, New York and Kansas City (Answers to Interrogatories, R 24). From September 1 to 14, 1976, Mr. Lawrence was a consultant to the National Conservative Political Action Committee engaged in advising and raising funds to support the candidacy of Orrin G. Hatch

for United States Senator from Utah in the Republican primary election. From September 15, 1976 to October 15, 1976, he was a consultant to the Hatch for Senate Committee, engaged in strategy planning, advertising and media relations, scheduling recommendations and fund raising within and without the State of Utah. He left Utah on October 15, 1976, and from then to election day worked on the senatorial election in New York State (Verified Complaint, R 1).

On October 26, 1976 in Salt Lake City, Utah, in a press conference, the following exchange took place between Mr. Moss and an as-yet unidentified member of the press:

> *Question:* "Mr. Richards said that you allege that Coors and other out-of-state extremists are running Hatch's campaign, or is it just that they have donated 5,000 bucks?"
>
> *Mr. Moss:* "I think they have done both. They put in the money to begin with to get it started and they set the tone of what the campaign would be. There are a lot of advisers. Besides Mr. Coors, there's Ernest Wilkinson and Leon Skousen who are local people that are advising Mr. Hatch, but a young man named Andy Lawrence has been there. Mr. Hatch, in a joint appearance that we had, admitted that Andy Lawrence had been there as a consultant. Well, I know about Andy Lawrence. He was the bag man for Spiro Agnew. And he worked for CREEP. And he was sent out here by these right-wing organizations to assist in this campaign. Now Mr. Hatch said Andy Lawrence is now gone. And I have to believe him. I haven't seen him. But he was here and he did work for a considerable period of time here."

> *Question:* "What do you mean when you say he was a 'bag man' for Spiro Agnew?"
>
> *Mr. Moss:* "(He) picked up the money Spiro would get."

This slanderous allegation was picked up and published in the Salt Lake City Tribune the next day in an article by Douglas L. Parker, which stated:

> "Senator Moss also pointed to a one-time Hatch campaign consultant Andy Lawrence, whom the senator described as a former 'bag man' for Vice President Spiro Agnew who worked for 'CREEP', the Committee to Re-elect the President, in Richard Nixon's 1972 campaign." (Exhibit 1 to Amended Complaint, R1)

Mr. Moss has not defended on the basis of the truth of his statement. He does not contend the statements were true when made, but that he believed the statements were true when made (Defendant's Answers to Interrogatories #6, R 284). From the affidavits and depositions on file, it appears that Mr. Lawrence's name was first mentioned in a press conference by Orrin Hatch on October 13, 1976; that that fact was reported to Moss' Administrative Assistant, Mary Jane Due, on October 18, 1976; that she and Tim Chambliss, a staff person, investigated Mr. Lawrence and found that he had worked for Mr. Agnew and CREEP and was active in fund raising for conservative causes, all of which was true; that she made inquiry regarding Mr. Lawrence of Hal Wolfe, an employee of the National Committee for an Effective Congress, in Washington; that Mr. Wolfe had no personal knowledge of Mr. Lawrence's activities, and consulted one Wesley McCune, an individual who made it his business to keep files on conservative organizations and operatives and sell a newsletter to support himself; that Wesley McCune

was the person who called Lawrence an "Agnew bag man", apparently based on some understanding on McCune's part that Lawrence was part of the "Townhouse" or "Committee of Nine" operation at the time he worked for the Vice President. McCune did not furnish documentation of this allegation to Wolfe, who nonetheless passed the allegation along to Mary Jane Due, who passed it to Senator Moss, who used it to describe G. Andrew Lawrence at the press conference on October 26, 1976. There is no evidence of any further attempts to verify Mr. McCune's "bag man for Spiro Agnew" label from any independent source or to substantiate that Mr. Lawrence ever received any funds on behalf of Spiro Agnew (Affidavits of Moss and Due, R 96 and 103, Deposition of Hal Wolfe, p. 28-43, 52).

There is no contention by Mr. Lawrence that Mr. Moss's actions were based upon ill will, hatred or strong personal dislike of Mr. Lawrence. Rather, Mr. Lawrence contends that Mr. Moss intentionally sought to downgrade him in the eyes of the public to further Moss' own political ambitions, with reckless disregard of the falsity of the allegation.

The District Court granted summary judgment, ruling that as a matter of law Mr. Lawrence was a "public figure" as defined by the pertinent Supreme Court cases; or alternatively, that Mr. Moss's allegation relates to a matter of "public or general concern" under the law of defamation of the State of Utah; that in either case Mr. Lawrence would have to prove the statement was made with actual malice, i.e. with knowledge of its falsity or with reckless disregard for its truth or falsity; and that "there does not exist evidence from which a jury could determine that defendant made this statement of which plaintiff complaints with 'actual malice.' " (Memorandum Decision, R 330).

Mr. Lawrence appealed the District Court decision to the United States Court of Appeals for the Tenth Circuit which reversed the District Court. Recognizing that the decision in *New York Times v. Sullivan,* 376 U.S. 254 (1964), protected the news reporting media against liability to public officials in the absence of actual malice, the Court of Appeals found "plaintiff here was not a public official." The Court then noted that the *New York Times* protection was extended to "public figures" by *Curtis Publishing Co. v. Butts,* and *Associated Press v. Walker,* both decided at 388 U.S. 130 (1967). The Court reviewed the subsequent decisions of this Court establishing the rule that a "public figure" is one who occupies a role of special prominence in the affairs of society or one who thrusts himself into the forefront of public controversy to influence the resolution of issues. It noted that the Court had recently expressly rejected the standard tentatively adopted in *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971), that the *New York Times* standard should extend to defamatory falsehoods relating to private persons if the statements involve matters of public or general concern.

The Court reviewed the activities of Mr. Lawrence in connection with the Utah campaign:

> "Because the events pertinent to this law suit all occurred in Utah, plaintiff's status in Utah is of prime importance. Before the 1976 election campaign, plaintiff had no Utah connections. He came to Utah in September, 1976 and from then until his October departure, he assisted the Hatch campaign as a private consultant in political polling, strategy, voter targeting volunteer organizations, advertising, writing, fund raising and general campaign management . . . (A 4)
>
> "Plaintiff's activities were in the background

and concerned with administrative organization. He did not thrust himself into public prominence in Utah. So far as the record shows he made no speeches and no radio or television appearances and did not write for public consumption. If he was a public figure, so are all those who participate inconspicuously in political action designed to influence an election.

"Plaintiff is a private individual who claims that he was defamed by another private individual. The First Amendment rights of a private individual can rise no higher than the rights of the news media considered in the *New York Times* line of cases.. *Wolston* says, 443 U.S. at 167-168, that

> 'A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. . . A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times.*'

"The participation of plaintiff in the Hatch campaign may have made him newsworthy, but did not transform him into a public figure. The status of the individual claiming to be defamed is the controlling factor, not the nebulous interest of the public in a matter with which he is inconspicuously involved. See *Littlefield v. Fort Dodge Messenger,* (8th Cir.) 614 F2d 581, 583-584. On the record presented, the plaintiff was not a public figure at the time of the alleged defamatory statement." (A-4, 7 and 8)

The Court of Appeals further determined that even if the alleged defamation involved a matter of public in-

terest, under the law of Utah the plaintiff was entitled to a jury trial on the question of the defendant's improper intent to do harm, knowledge of the falsity, a reckless disregard of the truth or falsity, and remanded the case for trial by jury.

Defendant Frank E. Moss then filed a timely Petition for Writ of Certiorari with this Court.

ARGUMENT

THE QUESTION WHETHER PLAINTIFF WAS A "PUBLIC OFFICIAL" AT THE TIME OF THE ACTS WHICH GAVE RISE TO THE DEFAMATION IS NOT PROPERLY BEFORE THIS COURT.

Petitioner Moss suggests in this Court for the first time that because plaintiff Lawrence was a federal government employee at the time that he worked in Vice President Agnew's office, he is therefore a "public official" under the *New York Times v. Sullivan* rule and must show actual malice. This argument was not raised in the motion for summary judgment to the District Court, was not ruled upon by the District Court, and although the Court of Appeals stated in its opinion "plaintiff here was not a public official", plaintiff reads that as referring to his status at the time of the defamation.

In any event, while the defamatory statement does not specify when the plaintiff is supposed to have picked up illegal money payments on behalf of the then Vice President, it must be inferred that the time frame must be between January 1970 when he started to work for the Vice President's office and January of 1973 when he left his employment with the Committee to Re-elect the President. There is no evidence in the record of any public attention or notoriety directed toward the plaintiff or any media exposure during that period of time, despite the intense public interest in the tax evasion charges which resulted in

the resignation of the Vice President, and in the activities of the Committee to Re-elect the President resulting from the "Watergate" incident.

The reason that there was no publicity is that plaintiff did nothing to warrant publicity during that period of time. He held a rather mundane job in the Vice President's office supervising the activities of the staff which responded to letters directed to the Vice President. At the Committee to Re-elect the President, he was also in charge of internal administration, and though the Committee's activities were examined microscopically by courts, congressional committees and the press, defendant has not pointed out one occasion on which the plaintiff's name was mentioned in the newspapers or over the airwaves.

Of course, the Committee to Re-elect the President was not a governmental agency and plaintiff could not have been a "public official" during his employment there. During his employment on the staff of Vice President Agnew, the record fails to disclose the plaintiff had "substantial responsibility for or control over the conduct of governmental affairs", the test established by *Rosenblatt v. Baer,* 383 U.S. 75 at 85 (1966). See also the comment in footnote 13 to the *Rosenblatt* decision, 383 U.S. at 86.

> "It is suggested that this test might apply to a night watchman accused of stealing state secrets. But a conclusion that the *New York Times* malice standards apply could not be reached merely because a statement defamatory of some person in government employ catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the

scrutiny and discussion occasioned by the particular charges in controversy."

While Mr. Moss's slanderous charges may have traced at least part of their origins to the plaintiff's employment in the office of Vice President Agnew, certainly his position as a clerical supervisor in a correspondance section is not such as would not such as would necessarily invite public scrutiny and discussion of the person holding it. Indeed the record fails to disclose any public discussion or interest in Mr. Lawrence during the 1970 to 1973 period of his employment, and he cannot be converted into a "public official" *ex post facto* by slanderous statements uttered four years after the cessation of his employment.

The record is bare of any factual support that the slanderous statement of defendant involved activities of the plaintiff as a "public official" as contemplated by the *New York Times v. Sullivan* line of cases. In any event, the issue was not properly argued to the District Court or the Court of Appeals and is not before this Court for decision.

2. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE CONTROLLING PRECEDENT IN THIS COURT.

In determining that the plaintiff in this case was not a "public figure" the Court of appeals applied standards established by this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Time, Inc. v. Firestone,* 424 U.S. 448 (1976), *Hutchinson v. Proxmire,* 443 U.S. 111 (1979), and *Wolston v. Reader's Digest Assn., Inc.,* 443 U.S. 157 (1979).

The Court discovered the common thread running through the cases since *Gertz,* that in order to be a "public figure" one must either occupy a position of such pervasive power and influence that he is deemed a public

figure for all purposes, or he must have thrust himself to the forefront of a particular public controversy in order to influence the resolution of the issues involved. In either event, the "public figure" must invite attention and comment. 418 U.S. at 345.

Prior to the defamation by the defendant, the plaintiff had attained no general reputation in Utah. From the record, the only times that plaintiff's name had appeared in print were in St. Louis, Missouri and in Washington, D.C. in connection with the GSA charges, and in a subsequent congressional investigation which received little or no fanfare. There is no evidence that he was known in the State of Utah outside of the close circle of Hatch supporters and staff members. When his name first came up, even Senator Moss had to send his staff scurrying to farflung sources to determine "who is Andy Lawrence?" He was not, himself, a candidate for elected office, and he did nothing to attract the limelight to himself. On the contrary, he avoided the limelight like a good staff person should do. He was promoting a candidate and it was his function to direct the attention of the voting public to the candidate and not to himself or other supporters. This he had one quite successfully until Senator Moss's derogatory remarks.

The Tenth Circuit Court of Appeals applied the standards enunciated in the recent Supreme Court cases to the undisputed facts in this case and decided that as a matter of law the plaintiff was not a "public figure." In doing so it departed in no way from precedent established by this Court.

3. THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON THIS QUESTION.

Petitioner contends that this Court should issue the writ of certiorari because of a supposed conflict between Cir-

cuit Courts of Appeals, citing *Time, Inc. v. McLaney*, 406 F2d 565 (5th Cir. 1969), *cert. denied* 395 U.S. 922 (1969), *Thompson v. Evening Star Newspaper Co.*, 394 F2d 774 (D.C. Cir. 1968), *cert. denied* 393 U.S. 884 (1968), and *Buchanan v. Associated Press*, 398 F.Supp. 1196 (D.D.C. 1975).

In *Time, Inc. v. McLaney*, decided in 1969, before this Court's decision in *Gertz v. Robert Welch, Inc., supra*, the Fifth Circuit found that

> "We conclude that the constitutional privilege extends to discussions by specific individuals, not associated with any government, if those individuals are involved in matters of important public concern." 406 F2d at 573

While that approach was embraced temporarily by this Court in *Rosenbloom v. Metromedia, Inc., supra*, it was subsequently repudiated by this Court in *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. at 167-168, quoted by the Tenth Circuit in its opinion in this case:

> "The private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention . . . A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times.*" (A-8)

The *McLaney* case may have been consistent with the state of development of the law in 1969, but it clearly is no longer the law in 1981.

Petitioner also decries the decision of the Tenth Circuit in this case as inconsistent with the decision of the District of Columbia Circuit in *Thompson v. Evening Star Newspaper Co., supra.* The facts of these two cases are en-

tirely different and the decisions are not inconsistent. In *Thompson,* the plaintiff had been a campaign manager for an unsuccessful political candidate. He was in the forefront of the campaign, giving speeches, issuing press releases, and calling attention as much to himself as to his candidate.

> "Appellant, a public relations man in the District of Columbia, as admittedly one of the founders and leaders of the group advocating the Dedmon-McGerr slate and was chairman of the Jesse Dedmon-Patricia McGerr democratic campaign committee . . . Appellant did not confine himself to private discussion of the issues in the primary but took a prominent role in a group appealing for public support." 394 F2d at 775, 776.

The District of Columbia Court contrasts the *Thompson* case with its prior decision in *Afro-American Publishing Co. v. Jaffe,* 366 F2d 649 (D.C. Cir. 1966), an *en banc* decision of the Court, which stated:

> "We conclude that *New York Times,* as written and likely to be extended, does not and will not preclude recovery, even in the absence of malice, by a man whose role is as non-public as plaintiff's, by a man who has not mounted a public rostrum, made an appeal to the public, sought or received public funds, offered a service or product for public use or comment, or organized a boycott or other group activity by members of the public." 366 F2d at 658.

The most recent expression of the law of the District of Columbia Circuit in this regard is *Waldbaum v. Fairchild Publications, Inc.,* 627 F2d 1287 (D.C. Cir. 1980), cert. denied ____ U.S. ____, 101 S.Ct. 266 (1980). In that decision, Judge Tamm exhaustively reviewed all the criteria

established by *Gertz v. Robert Welch, Inc., supra,* and the other Supreme Court decisions in this area. He concluded that

> "Once the Court had defined the controversy, it must analyze the plaintiff's role in it. Trivial or tangential participation is not enough. The language of *Gertz* is clear that plaintiffs must have 'thrust themselves to the forefront' of the controversies so as to become factors in their ultimate resolution. 418 U.S. at 345. They must have achieved a 'special prominence' in the debate. *Id.* at 351. The plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution. In undertaking this analysis, a court can look to the plaintiff's past conduct, the extent of press coverage, and the public reaction to his conduct and statements. . .
>
> "Not everyone who participates in activities that affect the public becomes a public figure. Nevertheless, when one assumes a position of great influence within a specific area and uses that influence to advocate and practice controversial policies that substantially affect others, he becomes a public figure for that debate." 627 F2d at 1296, 1300

Without specifically adverting to the criteria, these are the same which were applied by the Tenth Circuit in the instant case. The Court analysed the plaintiff's past conduct, the fact that he was virtually unknown in Utah prior to the defamatory statement,[1] the fact that he had made no public

[1]Cf. Id. 627 F2d at 1295, footnote 22, citing *Gertz,* 418 U.S. at 351-52.

statements of his own attempting to influence the outcome of the debate. There is no conflict between the law of the Tenth Circuit and the law of the District of Columbia Circuit.

4. THE FIRST AMENDMENT PROTECTIONS ENUNCIATED IN THE NEW YORK TIMES V. SULLIVAN LINE OF CASES DO NOT EXTENT TO NON-MEDIA DEFENDANTS.

Plaintiff Lawrence was not a candidate for public office, so it cannot be argued that he was fair game on any subject relating to his fitness for public office. *Garrison v. Louisiana,* 279 U.S. 64 (1964). Defendant was a sitting United States Senator and was a candidate for public office, and as such he had ready access to the media as evidenced by the fact that the alleged defamatory statement in this case took place at a press conference called by him to further his campaign.

The Tenth Circuit Court of Appeals properly found that this was a law suit by one private individual against another private individual. If this Court agrees with its conclusion that Mr. Lawrence was not a "public figure", it is necessary to go no further, although the question whether the "public figure" standard applies to non-media defendants is an open question in this Court:

> "Neither the District Court nor the Court of Appeals considered whether the *New York Times* standard can apply to an individual defendant rather than to a media defendant. At oral argument, counsel for Hutchison stated that he had not conceded that the *New York Times* standard applied. This Court has never decided the question: our conclusion that Hutchison is not a public figure makes it unnecessary to do so in

this case." *Hutchinson v. Proxmire,* 443 U.S. at 1314, footnote 16.

Should this Court determine that Mr. Lawrence was a "public figure" then it would be necessary to go one step further and determine whether this finding made it necessary for the trial court to apply the "actual malice" standard developed in the *New York Times v. Sullivan* line of cases, and to give some guidance to the trial court and to the nation at large as to the nature and extent of the privilege which is being extended to politicians to defame their opponent's supporters. In *Gertz v. Robert Welch, Inc., supra,* this Court explained that the rule developed in the *New York Times v. Sullivan* line of cases as applicable to public figures is a compromise between absolute liability and absolute license on the part of the press, in an effort to give reasonable protection to an individual's reputation while not discouraging full and free discussion. The Court recognizes that in order to insure a free press, there must be some latitude for human error and that absolute liability would have a chilling effect on discussion of public issues by the press.

> "(T)he Court has concluded that the protection of the *New York Times* privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures . . . We think that these decisions are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability. Rather we believe that the *New York Times* rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons. For the reasons stated below, we conclude that the state interest in com-

> pensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them." 418 U.S. at 343.

This Court went on to explain that one of the principal considerations in relaxing the standards applicable to media defendants is that public figures ordinarily have more access to the press to rebut erroneous statements than do ordinary private citizens. It is this balancing of access which equalizes the equation and makes non-malicious departures from the truth by the press and broadcast media constitutionally palatable. There is no such corresponding balance of access when the defamer is a candidate for public office with thousands of dollars in his war chest, some of which may have been given to him out of public funds for the purpose of buying time in newspapers and on television, and the person defamed is a supporter of an opposing candidate with no funds of his own, and no access to the public treasury or to the campaign war chests of the candidates whom he supports. When a senatorial candidate holds a press conference a week before the election, the story is front-page news. If Mr. Lawrence, who was not even in the State of Utah at the time that the statement was made, held a press conference several days later to rebut the allegations, if any reporters showed up, the story would probably be carried on the last page of the last section behind the obituaries.

The principal has been developed by this Court that publishers and broadcasters will not be liable for falsehoods which were neither deliberate nor reckless, *provided* the person defamed has access to the same or other media to correct the falsehood. It is the *qui pro quo* extracted as a condition of the privilege, because otherwise the media would have the unfettered power to destroy a man's reputation while denying him the communication resources to answer his defamer. There would be no "full

and free debate" because only the voices of the publishers and broadcasters would be heard, and not those who oppose them. In any debate there must be two sides with equivalent opportunity to present their position. The access requirement is designed to prevent media dominance of public debate to the exclusion of conflicting views and corrective statements.

The principle of equal access might even be extended to include competing candidates for the same office. However, unless the Court is to impose some equal time requirement on the media to permit private individuals who are not candidates for office to respond to defamatory remarks about them by candidates, there can be no "balancing of interests." This would be an extreme and unwarranted step, one which is not advocated by the plaintiff in this case.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari to the Tenth Circuit Court of Appeals, and thereby let stand that Court's determination that plaintiff is not a "public figure" and that the case should be remanded to the United States District Court for the District of Utah for trial by jury in accordance with the decision of the Court of Appeals.

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No. 80-1669

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

FRANK E. MOSS, *Petitioner,*

v.

G. ANDREW LAWRENCE, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE BY THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI; AND BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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v

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v.

G. ANDREW LAWRENCE, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE BY THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

The Society of Professional Journalists, Sigma Delta Chi moves this Court for leave to file a brief as *amicus curiae* in support of the Petition for a Writ of Certiorari in this case. The consent of the petitioner, Frank E. Moss, has been obtained. The consent of the respondent, G. Andrew Lawrence, has been requested and denied. As an organization whose members are engaged in the gathering and dissemination of news reports concerning election campaigns, movant believes

that the ability of its members to perform this function has been greatly encumbered by the decision below.

Movant believes that its brief as *amicus curiae* will aid this Court by (1) clarifying the far-reaching ramifications of the court of appeals decision for reporting the news during election campaigns, (2) describing how this decision, if permitted to stand, will inhibit criticism of active participants in election campaigns, and (3) elucidating why the decision below is flatly inconsistent with well-established principles of constitutional law articulated by this Court and in conflict with numerous other lower court rulings.

Accordingly, movant respectfully requests this Court to grant leave to file its accompanying Brief in Support of the Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE

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BRIEF AS AMICUS CURIAE OF THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

INTEREST OF AMICUS CURIAE

The Society of Professional Journalists, Sigma Delta Chi is a voluntary, not-for-profit organization of 25,000 members representing every branch and rank of print and broadcast journalism. It is, in fact, the largest, oldest, and most representative organization of journalists in the United States. Among the Society's purposes are its commitments to ensure that the public's business be conducted in public and to keep governmental records open to public inspection. Members of

the Society regularly prepare news reports about election campaigns, frequently including reports about the new breed of political professional that manages those campaigns.

ARGUMENT

The Court of Appeals Decision Unconstitutionally Denies the Press and Public the Requisite First Amendment Protection When Reporting on Election Campaigns and Those Individuals Who Actively Participate in Them.

Elections and political campaigns number among the most portentous events in American society. Successful candidates shape our democracy and the nation's destiny. The First Amendment guarantees voters a full and free debate on each candidate and the conduct of electoral campaigns. It is precisely the vigor of that debate which the court of appeals decision below threatens to dampen by restricting dissemination of information about candidates for public office.

Professional politicians like respondent G. Andrew Lawrence ("Lawrence") play extremely important roles in election campaigns.[1] One commentary about

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[1] Because of their importance to the outcome of elections, these professional campaigners are frequently the subjects of press reports. A sampling of magazine coverage of the 1976 and 1980 presidential campaigns yields dozens of articles about the professional politicians who run election campaigns and advise candidates both before and after the elections. *See, e.g., Who'll Be With Carter If He Gets To The White House,* U.S. News & World Report, July 19, 1976, at 23 (concerning, among others, Carter supporters Hamilton Jordan, Jody Powell, and Stuart Eizenstat); *Deputy President,* Newsweek, July 30, 1979, at 34 (Hamilton

the campaign managers for Ronald Reagan and Jimmy Carter during the 1980 election described their importance:

> [A]s managers of modern Presidential campaigns, William J. Casey and Hamilton Jordan have a unique vocation in common—a high-pressure, $30 million enterprise that is as complex as most large corporations, as subtle as chess, as final as war. The decisions Casey and Jordan make may well decide the 1980 election.[2]

Many of these campaign professionals have a long history of involvement at various levels of government, in

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Jordan); *Kennedy's Inner Circle*, Newsweek, Sept. 24, 1979, at 39 (Kennedy aides Paul Kirk, Carey Parker, Carl Wagner, Lawrence Horowitz, and Stephen Smith); *"Thank God Almighty . . .", Carter Puts A Pro In Charge*, Time, Nov. 19, 1979, at 41 (Carter campaign chairman Robert Strauss); *Boys in the Back Room*, Newsweek, Feb. 4, 1980, at 37 (Reagan campaign manager John Sears and Bush campaign manager James Baker); *"He Was the Cruiser"*, Time, Mar. 10, 1980, at 17 (Reagan's ousted campaign manager Sears and new campaign manager William Casey); *The Men Who Manage The Campaigns*, U.S. News & World Report, Apr. 28, 1980, at 69 (Strauss, Smith, Baker, and Casey); *People To Watch If GOP Wins the White House*, U.S. News & World Report, July 21, 1980, at 19 (Reagan campaign advisors, including Edwin Meese, Casey, Richard Allen, and Lyn Nofziger); *Kraft Drops Out*, Time, Sept. 29, 1980, at 25 (Carter national campaign manager Tim Kraft); *Draft Picks for the New Team*, Time, Nov. 17, 1980, at 41 (Meese, Baker, Michael Deaver, and Allen).

[2] Newsweek, Oct. 6, 1980, at 45; *accord*, Time, Jan. 21, 1980, at 31; Newsweek, Feb. 4, 1980, at 37 (Reagan's failure to win 1976 presidential nomination attributed in part to campaign director's decision to announce vice-presidential candidate prior to nominating convention).

the electoral process, as staff members for elected candidates, and as public officials.[3]

It has become increasingly clear during recent election campaigns that the candidate's policy positions are the result not merely of his personal ideology, but of the campaign organization's synergistic efforts to conceive appealing platforms.[4] The candidate's campaign staff is composed of policymakers, issue-developers, strategists, speechwriters, and spokesmen—orches-

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[3] *See, e.g.*, Newsweek, July 30, 1979, at 34 (Hamilton Jordan's involvement in Jimmy Carter's gubernatorial campaigns in Georgia); *id.*, Sept. 24, 1979, at 39 (Ted Kennedy aides' involvement in campaigns of John F. Kennedy, Robert F. Kennedy, and George McGovern); Time, Jan. 21, 1980, at 31 (Reagan campaign manager John Sears's involvement in Richard Nixon's campaign and administration); U.S. News & World Report, Apr. 28, 1980, at 69 (Bush campaign manager James Baker's involvement in Gerald Ford's 1976 campaign; Reagan campaign organizer William Casey's role in Richard Nixon's 1968 campaign and in Nixon administration); Bus. Week, July 28, 1980, at 41 (allegations of impropriety during Nixon administration involving Reagan advisor Richard Allen; previous involvement of Reagan political director William Timmons with Nixon congressional relations office); Time, Nov. 17, 1980, at 41 (Reagan aide's involvement with 1976 Ford campaign and 1980 Bush campaign); People, Nov. 24, 1980, at 65, 68 (biographical article concerning Reagan advisor Edwin Meese's 13-year involvement with Reagan).

[4] *See, e.g.*, Sidey, *The Presidency: Too Many Horse Handlers*, Time, Mar. 17, 1980, at 24 ("[I]n today's world of intense scrutiny, when a tiny glitch can sink a campaigner, the candidates have become frightened and more dependent than ever on their experts . . . ."); U.S. News & World Report, July 19, 1976, at 23 ("brain trust involved in drafting stands on campaign issues" for Jimmy Carter's 1976 presidential campaign).

trators of the candidate's positions during the campaign.[5]

It is not only the policy-development role that these professional politicians fill for their candidates. In a very real sense, active participants in election campaigns pave the way for their candidates to be elected. They solicit contributions and endorsements, schedule candidate appearances, plan advertising campaigns, recruit volunteers, and orchestrate mass mailings and get-out-the-vote drives.[6] In addition, they operate within the party structure, forging alliances, negotiating compromises, and placating diverse elements of the party hierarchy.[7]

When the candidate is successful, these active participants in his campaign more likely than not become integral parts of the newly elected official's permanent policymaking staff.[8] They often serve as press secretary, domestic affairs advisor, chief of staff, or any of a number of other public officials.[9] Even when these professional politicians do not remain in the political arena, they are likely to have a lasting effect on public

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[5] *See, e.g.*, Sidey, *supra* note 4, at 24; U.S. News & World Report, July 28, 1980, at 19.

[6] *See, e.g.*, Newsweek, Feb. 4, 1980, at 37.

[7] *See, e.g.*, Time, Jan. 21, 1980, at 31; *id.*, Aug. 25, 1980, at 19.

[8] *See, e.g.*, U.S. News & World Report, Nov. 15, 1976, at 45 (roles in Carter administration for 1976 campaign advisors Jordan, Powell, and Eizenstat); *id.*, Nov. 17, 1980, at 48 (administration roles for Reagan campaign advisors Meese, Anderson, Allen, Casey, Nofziger, and Wirthlin).

[9] *Id.*

affairs. They, after all, help shape an elected official's views and his subsequent actions.[10]

In the instant case, Lawrence epitomizes the political professional hired expressly for the purpose of influencing the outcome of electoral contests. He was sent to Utah as an experienced, highly trained professional by an outside group of political operatives.[11] He received extensive training from both the Republican Party and private political committees in the art of electioneering.[12] In the Hatch campaign, he engaged in political polling, strategy formulation, voter targeting, volunteer organization, advertising, writing, fundraising, and general campaign management.[13] He consulted and advised the candidate on commercials, endorsement solicitation, direct mail, voter turnout, get-out-the-vote drives, statewide organizational structure, scheduling, and candidate appearances.[14]

Since paid political professionals such as Lawrence become inextricably intertwined with political candidates and campaigns, press disclosure of information

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[10] When their candidates do not succeed, professional politicians regularly move to another candidate and campaign. *See, e.g.*, Newsweek, Nov. 24, 1980, at 42-43 (James Baker, campaign manager for George Bush, subsequently joined Ronald Reagan's campaign).

[11] Lawrence v. Moss, No. C78-195, at B10 (D. Utah 1979) [page citation to Appendix to Petition for Certiorari].

[12] *Id.* at B6-B11.

[13] *Id.*

[14] *Id.* It is ironic that the criticism voiced in the instant case concerned Lawrence's employment relationship with a politician who a court recently found had taken bribes. *See* N.Y. Times, Apr. 28, 1981, at A1.

about these individuals is an integral part of political campaign expression protected by the First Amendment. In its most significant election law decision, this Court affirmed that speech relating to election campaigns "operates[s] in an area of the most fundamental First Amendment activities." *Buckley* v. *Valeo,* 424 U.S. 1, 14 (1976). The Court explained that "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course we follow as a nation." *Id.* Accordingly, the First Amendment has its "fullest and most urgent application to the conduct of campaigns for political office." *Id.* at 15.

The Court in *Buckley* found that the contribution and expenditure limitations of the Federal Election Campaign Act ("FECA")[15] necessarily burden expression during an election campaign and can be sustained only if the supporting governmental interests satisfy exacting scrutiny under the First Amendment. *Id.* at 25, 44-46. The Court struck down FECA's expenditure limitations because they "necessarily reduced the quantity of expression by restricting the number of issues discussed, the depth of exploration, and the size of the audience reached." *Id.* at 19. Neither the possibility of corruption, the appearance of corruption, nor any other governmental interest can justify substantial and direct

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[15] 2 U.S.C. §§ 431-55 (1976 & Supp. III 1979) (originally enacted as Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 301, 86 Stat. 11, as amended by Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 201, 88 Stat. 1272; Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 101, 90 Stat. 475; Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 101, 93 Stat. 1339 [hereinafter cited as 2 U.S.C.].

restrictions on the ability of citizens to engage in protected political expression. *Id.* at 59-60.[16]

Buckley teaches that political expression protected by the First Amendment encompasses information about professional politicians actively engaged in election campaigns. Public discussion of campaign issues readily draws in candidates and their positions, voting records, and other official conduct. *Id.* at 43 n. 50. The conduct of the candidate of necessity implicates the structure and management of his campaign and those professionals paid to make it successful. The First Amendment mandates that expression about such participants not be limited.[17]

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[16] *Buckley* also found limitations on personal expenditures by candidates on their own behalf unconstitutional under the First Amendment. A candidate, "no less than any person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates." 424 U.S. at 52. Public discussion is a public duty particularly imposed on candidates for public office. *Id.* at 53. Protection of the candidate's own speech ensures that "candidates have an unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." *Id.*

The court of appeals characterization of this suit as one against a private individual ignores the fact that the speaker was a candidate for election at the time of the alleged defamation. The candidate's remark, as is frequently the case, was covered by the press.

[17] *Buckley, supra,* 424 U.S. at 19, 26, recognizes the significance of fundraising, mass media advertising, and sophisticated polling and mailing operations to effective campaigning. The growing importance of these activities enhances the campaign roles of those professionals paid to perform them.

Buckley also addressed FECA's requirements for public reporting of political contributions and expenditures, *id.* at 60, includ-

The First Amendment interests explicated in *Buckley* are consistent with this Court's decisions in defamation cases that the First Amendment requires "breathing space" in election campaigns. In *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964), the Court concluded that expression is favored by the First Amendment to the extent that it concerns "debate on public issues." In relation to candidates for public office, the Court in *New York Times* recognized that

> [i]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great and the chance of injury to private character so small that such discussion must be privileged.

Id. at 281-82 (quoting *Coleman* v. *MacLennan,* 78 Kan. 711, 98 P. 281 (1908)).

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ing expenditures for services of political consultants in support of election campaigns, *see* 2 U.S.C. § 434(b). The Court found that in addition to deterrence of corruption and the appearance of corruption, such disclosure informs the electorate of the source of campaign funds and the method by which funds are spent to aid voters in candidate evaluation. The public interest in disclosure of campaign expenditures set forth in *Buckley* is commensurate with the First Amendment purpose of full and free disclosure of campaign issues, candidate qualifications, and the conduct of campaigns. *See* Buckley, *supra,* 424 U.S. at 14.

Thus, in a pair of unanimous decisions in 1971, this Court applied the *New York Times* requirement of constitutional malice to libel suits against the press brought by candidates in election campaigns. In *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272 (1971), the Court asserted that the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." Similarly, in *Ocala Star-Banner Co.* v. *Damron,* 401 U.S. 295, 300-01 (1971), the Court reiterated that "[p]ublic discussion about the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule."

The manifest First Amendment interest in press reports concerning election contests is in no way limited when the plaintiff in a defamation suit is not a candidate but an active participant in his campaign. As this Court has explained:

> Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks. The clash of reputations is the staple of election campaigns . . . .

Monitor Patriot Co., supra, 401 U.S. at 275.[18]

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[18] *See* Monitor Patriot Co., *supra,* 401 U.S. at 275 ("A community that imposed legal liability on all statements in a political campaign deemed 'unreasonable' by a jury would have abandoned the First Amendment as we know it."); Thompson v. Evening Star Newspaper Co., 394 F.2d 774, 776 (D.C. Cir. 1968) ("The public plainly has a vital interest not only in the calibre of candidates for political office, but in the nature of the groups or factions supporting the candidates, and the quality of candidates' spokesmen and backers are appropriate considerations to be taken into

In contrast to the First Amendment interest in expression about political campaigns, the state interest in protecting individual reputation is greatly diminished when the plaintiff in a defamation suit plays an active role in the political process. Such a person "must accept certain necessary consequences of involvement in public affairs" and runs "the risk of closer public scrutiny." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 344 (1974). This "compelling normative consideration," *id.* at 344, renders him less deserving than a truly private individual of the protections provided by the law of defamation.

To distinguish "public figures" from private individuals who have "relinquished no part of [their] interest in the protection of [their] good name," *id.* at 345, this Court has formulated a test that seeks to identify those who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* By requiring that the plaintiff purposefully seek to "influence the resolution" of a "public controversy," the Court makes certain that the public-figure plaintiff has assumed the risk of "public scrutiny."

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account."); Buchanan v. Associated Press, 398 F.Supp. 1196, 1203 (D.D.C. 1975) ("Since the [Finance] Committee [to Re-Elect the President] was surely the legitimate object of searching public scrutiny, its agents . . . also must be examined carefully and come within the area of great public concern.") As Justice White noted in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 61 (1971) (White, J., concurring):

> Discussion of the conduct of public officials cannot, however, be subjected to artificial limitations designed to protect others involved in an episode with officials from unfavorable publicity. Such limitations would deprive the public of full information about the official action that took place.

As a class, therefore, those who play an active role in political campaigns must be categorized as "public figures" when they bring defamation actions. There is no more significant "public controversy" for First Amendment purposes than a campaign for election to public office.[19] By definition, an active participant in an election campaign voluntarily seeks to influence the resolution of that public controversy. His sole function is to convince voters to elect one candidate rather than another. Like the public official, the active participant in an election campaign is subject to the constitutional malice standard by virtue of his role in the political process.[20]

The court of appeals, however, held that Lawrence is not a public figure because he did not thrust himself into "public prominence."[21] This conclusion is based

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[19] Since a political campaign is by its nature a "public controversy," courts determining whether an active campaign participant is a "public figure" are spared the task of determining on an *ad hoc* basis "what information is relevant to self-government," Gertz, *supra,* 418 U.S. at 346.

[20] If a defamatory statement concerning an active participant in a political campaign is unrelated to the election contest and does not touch on the candidate's "fitness for office," Garrison v. Louisiana, 379 U.S. 64, 77 (1964), this Court's established rules would permit him to recover upon a showing of negligence, *see* Rosenblatt v. Baer, 383 U.S. 75, 84 (1966). Moreover, not all campaign workers are public figures by virtue of their participation in a campaign; there is a common sense distinction, long applied by this Court in the public official context, between nightwatchmen and secretaries on the one hand, and those who solicit funds, plan strategy, advocate the candidate's election, or advise the candidate, on the other. *Id.*

[21] Lawrence v. Moss, No. 79-1922, at A7 (10th Cir. Jan. 13, 1981) [page citation to Appendix to Petition for Certiorari].

on the court's understandable confusion in considering two distinct branches of the public figure test.[22] There is no contention in this case that Lawrence is a public figure under the first branch because of his "pervasive fame or notoriety." *Id.* at 351. Rather, Lawrence is a public figure under the second branch of the test because of his influential role in an election campaign for the United States Senate.[23]

Misapplication of the public figure test in this case constructs a sharply barbed barrier to news reports about election campaigns. In this first significant ruling on the question since this Court's pronouncements in *Wolston* v. *Reader's Digest Association,* 443 U.S. 157 (1979), and *Hutchinson* v. *Proxmire,* 443 U.S. 111 (1979), the court of appeals has advised the press that news reports about campaign officials—even newsworthy accusations made in the heat of the campaign —are published only at the peril of libel litigation where the *New York Times* protections will not obtain, but where the plaintiff can recover upon a showing of mere negligence. The plethora of pre-1979 cases recog-

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[22] *See* Note, *The Editorial Function and the Gertz Public Figure Standard,* 87 Yale L.J. 1723, 1733 (1978).

[23] This case illustrates an unfortunate byproduct of this Court's recent attempts to stem unwarranted expansion of the application of the constitutional malice standard. The court of appeals, by mechanical reference to tests devised for those whose conduct has scant relevance to the political process, has seriously inhibited the dissemination of information that lies at the heart of *New York Times Co., supra.* In contrast, other courts have applied the constitutional malice standard to plaintiffs who can not, by any stretch of the imagination, be said to have played a role in the political process, even though they clearly satisfy the definition of a "public figure" set forth in *Gertz* and its progeny. *See, e.g.,* Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976).

nizing that these individuals must prove constitutional malice may well be disregarded when a journalist assesses the risks of publishing articles about participants in the campaign process.[24] Certainly, a conscien-

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[24] The number of pre-1979 decisions holding that active participants in election campaigns are public figures is impressive and indicates the significant change in the law worked by the court of appeals decision. *See, e.g.*, Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969) (plaintiff provided helicopters to campaign committee); Thompson v. Evening Star Newspaper Co., 394 F.2d 774 (D.C. Cir. 1968) (participant in Democratic Party primary campaign); Whitaker v. Denver Post, Inc., 4 Media L. Rep. (BNA) 1351 (D. Wyo. 1978) (participant in Wyoming political campaigns); Buchanan v. Associated Press, 398 F. Supp. 1196 (D.D.C. 1975) (parttime accountant for Finance Committee to Re-Elect the President); Gleichenhaus v. Carlyle, 5 Media L. Rep. (BNA) 1602 (Kan. 1979) (contributor to mayoral campaign); A. S. Abell Co. v. Barnes, 258 Md. 56, 265 A.2d 207 (1970), *cert. denied*, 403 U.S. 921 (1971) (candidate for state constitutional convention); Perkins v. Mississippi Publishers Corp., 241 So.2d 139 (Miss. 1970) (active participant in Mississippi politics); Adams v. Frontier Broadcasting Co., 2 Media L. Rep. (BNA) 1166 (Wyo. 1976) (active politician and candidate); News Journal Co. v. Gallagher, 233 A.2d 166 (Del. 1967) (chairman of Wilmington City Republican Committee); Weingarten v. Block, 5 Media L. Rep. (BNA) 2595 (Cal. Ct. App. 1980) (member of Democratic Central Committee for Monterey County); Guthrie v. Annabel, 50 Ill. App.3d 969, 365 N.E.2d 1367 (Ill. App. 1977) (chairman of political party central committee); Tait v. King Broadcasting Co., 1 Wash. App. 250, 460 P.2d 307 (1969) (state chairman of Conservative Party); Gilberg v. Goff, 21 A.D.2d 517, 251 N.Y.S. 2d 823 (1964) (law partner of mayoral candidate is public figure for purposes of article about campaign); Bianco v. Palm Beach Newspapers, Inc., 6 Media L. Rep. (BNA) 1484 (Fla. Dist. Ct. Mar. 26, 1980) (president of Sunshine Democratic Club); Tracy v. New York Magazine Co., 3 Media L. Rep. (BNA) 2294 (N.Y. Sup. Ct. 1978) (office manager of mayoral campaign); *cf.* Rebozo v. Washington Post Co., 6 Media L. Rep. (BNA) 2505, 2508 (5th Cir. Feb. 19, 1981) (close friend of former President Nixon is

tious press attorney must advise a client that there is a significant possibility that an article discussing individuals such as Lawrence will become the subject of troublesome and costly litigation.[25] As a result, the press will be "deterred" from publishing such an article,

> even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.

New York Times Co., supra, 376 U.S. at 279. In this manner, the court of appeals decision "dampens the vigor and limits the variety of public debate" and is therefore "inconsistent" with the First Amendment. *Id.; accord, Buckley, supra,* 424 U.S. at 19.

Accordingly, *amicus* urges the Court to seize this opportunity to reaffirm, for the benefit of lower courts,

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public figure because, *inter alia,* he "played an active role in the President's 1972 re-election campaign"); Washington v. World Publishing Co., 506 P.2d 913 (Okla. 1972) (dispute between Senate candidate and party county chairman is event of public interest); Miller v. Argus Publishing Co., 79 Wash.2d 816, 490 P.2d 101 (1971) (article about plaintiff engaged in public relations and advertising in political campaign is of public interest).

[25] *See* Anderson, *Libel and Press Self-Censorship,* 53 Tex. L. Rev. 422, 438-41 (1975) (prominent role of attorney in press publication decisions). A number of enormous verdicts rendered against the press in the past year demonstrate the very real threats of substantial penalties. *See, e.g.,* Burnett v. National Enquirer, No. C 15213 (Cal. Super. Mar. 26, 1981) ($1,600,000); Pring v. Penthouse International, No. C79-3518 (D. Wyo. Mar. 27, 1981) ($12,500,000, reduced from jury award of $25,000,000); Green v. Alton Telegraph Printing Co., No. C-77-L-66 (Ill. 3d Cir., Madison Cty. 1980) ($9,100,000).

the manifest First Amendment interest in the dissemination of information in election campaigns and the concomitant diminished state interest in redressing injuries allegedly suffered by those who play an active role in those campaigns. Otherwise, the court of appeals decision will engender "unpredictable results and uncertain expectations," *Gertz, supra,* 418 U.S. at 343, which will result in a decrease in meaningful news reports about the electoral process.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

JONES, WALDO, HOLBROOK & MCDONOUGH
A PROFESSIONAL CORPORATION

April 24, 1981

Mr. Bruce W. Sanford
BAKER & HOSTETLER
Attorneys at Law
818 Connecticut Avenue, N.W.
Washington, D.C. 20006

RE: Moss v. Lawrence, Supreme Court Docket No. 80-1669

Dear Mr. Sanford:

As counsel of record for petitioner, Frank E. Moss, we hereby give our consent for the filing of an *amicus curiae* brief on behalf of the Society of Professional Journalists, Sigma Delta Chi.

Very truly yours,

JONES, WALDO, HOLBROOK & MCDONOUGH

/s/ DONALD B. HOLBROOK
Donald B. Holbrook

DBH:cs